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No. 05-595
Title: Glen Whorton, Director, Nevada Department of Corrections, Petitioner
v.
Marvin Howard Bockting
Docketed: November 10, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-15866)
Decision Date: February 22, 2005
Rehearing Denied: August 11, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 7 2005	Petition for a writ of certiorari filed. (Response due December 12, 2005)
Dec 12 2005	Brief of respondent Marvin Howard Bockting in opposition filed.
Dec 12 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 28 2005	DISTRIBUTED for Conference of January 13, 2006.
Apr 10 2006	Supplemental brief of petitioner filed..
Apr 18 2006	DISTRIBUTED for Conference of May 11, 2006.
May 3 2006	Supplemental brief of respondent Marvin Howard Bockting filed. (Distributed)
May 15 2006	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 15 2006	Petition GRANTED.
Jun 12 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 20, 2006.
Jul 19 2006	Joint appendix filed.
Jul 19 2006	Brief of petitioner Glen Whorton, Director, Nevada Department of Corrections filed.
Jul 20 2006	Brief amicus curiae of United States filed.
Jul 20 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jul 20 2006	Brief amici curiae of Texas, et al. filed.
Aug 2 2006	Extension of time within which to file respondent's brief on the merits to and including September 15, 2006.
Aug 14 2006	SET FOR ARGUMENT on Wednesday, November 1, 2006.
Aug 14 2006	CIRCULATED.
Aug 25 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 19 2006	Order further extending time to file respondent's brief on the merits to and including September 20, 2006.
Sep 20 2006	Brief of respondent Marvin Howard Bockting filed. (Distributed)
Sep 20 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 20 2006	Brief amici curiae of Hon. Edward N. Cahn, et al. filed. (Distributed)
Sep 20 2006	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Sep 22 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 26 2006	Record received from U.S.D.C. for the District of Nevada. (1 Box)
Oct 2 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

and for divided argument GRANTED.

Oct 20 2006 Reply of petitioner Glen Whorton, Director, Nevada Department of Corrections filed. (Distributed)

Nov 1 2006 Argued. For petitioner: George J. Chanos, Attorney General, Las Vegas, Nev.: and Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Frances A. Forsman, Federal Public Defender, Las Vegas, Nev.

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No. _____

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER, IN DIRECT CONFLICT WITH THE PUBLISHED OPINIONS OF THE SECOND, SIXTH, SEVENTH, AND TENTH CIRCUITS, THE NINTH CIRCUIT ERRED IN HOLDING THAT THIS COURT'S DECISION IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004) REGARDING THE ADMISSIBILITY OF TESTIMONIAL HEARSAY EVIDENCE UNDER THE SIXTH AMENDMENT, APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

II. WHETHER THE NINTH CIRCUIT'S RULING THAT *CRAWFORD* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW VIOLATES THIS COURT'S RULING IN *TEAGUE V. LANE*, 489 U.S. 288 (1989).

III. WHETHER, IN DIRECT CONFLICT WITH THE PUBLISHED DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS, THE NINTH CIRCUIT ERRED IN HOLDING THAT 28 U.S.C. § 2254 (d) (1) AND (2) ADOPTED THE *TEAGUE* EXCEPTIONS FOR PRIVATE CONDUCT WHICH IS BEYOND CRIMINAL PROSCRIPTION AND WATERSHED RULES.

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In the
Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

The Respondent Glen Whorton, Director, Nevada Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

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[1] Glen Whorton assumed the position of Director, Nevada Department of Corrections on September 15, 2005, replacing the former director Robert Bayer, who was previously named as the State Respondent in the district court, and Bockting's custodian.

OPINIONS AND JUDGMENTS BELOW

The order denying the Director's petition for rehearing (Appendix A) is reported at 418 F.3d 1055. The order amending the opinion of the Ninth Circuit (Appendix B) is reported at 408 F.3d 1127. The original opinion of the Ninth Circuit (Appendix C) is reported at 399 F.3d 1010. The order of the Ninth Circuit directing the parties to file simultaneous briefs (Appendix D) is unreported. The opinion of the district court (Appendix E) is unpublished.

The second opinion of the Nevada Supreme Court on direct review in this case (Appendix F) is reported at 109 Nev. 103, 847 P.2d 1364. The order of this Court granting certiorari, vacating the first judgment of the Nevada Supreme Court, and remanding the case (Appendix G) is reported at 497 U.S. 1021. The first opinion of the Nevada Supreme Court on direct review in this case (Appendix H) is unpublished.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

2. Section 1 of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

3. 28 U.S.C. § 2254(d) provides:

   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2005. The order denying the Director's petition for rehearing was entered on August 11, 2005. The Director invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court "reconsider[ed]" and then rejected the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), for determining when an unavailable witness's testimonial statement against a criminal defendant may be admitted. In its place, the Court adopted a new test, under which such statements may not be introduced at trial unless the defendant had the opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 53-54. At issue in this case is whether *Crawford* applies retroactively to cases on collateral review when that decision was announced. Creating an acknowledged conflict with other

circuits, the Ninth Circuit held in this case that *Crawford* does apply retroactively to such cases. The court further held that it may grant habeas relief under 28 U.S.C. § 2254(d)(1) even though the literal language of the provision forecloses such relief. Certiorari should be granted to eliminate the conflict, forestall the disruption caused by the Ninth Circuit's decision, and correct the Ninth Circuit's erroneous decision.

On September 22, 1988, the Respondent Bockting was convicted by way of a criminal judgment of conviction of the crimes of Sexual Assault, three counts, in the State district court in Las Vegas. The victim of the crimes was Bockting's six year old step daughter. At trial, the young child was unresponsive to any questions when placed on the witness stand, and would not even stand up to be sworn, or state her name, when requested by the trial judge. The State trial court judge thereupon invoked NRS 51.385 (1) which permitted the child's hearsay statements made to her mother and a police detective concerning Bockting's assaults to be admitted into evidence, due to her unavailability. In the direct appeal, Bockting challenged the constitutionality of NRS 51.385 (1) under this Court's then-recent decision in *Coy v. Iowa*, 487 U.S. 1012 (1988) as a violation of the right to confront witnesses. The Nevada Supreme Court denied the claim, pointing out that the Nevada statute provided for an individualized hearing outside the presence of the jury regarding the trustworthiness of the hearsay testimony and the witness's unavailability or inability to testify. The Nevada Supreme Court found that the statute comported with this Court's requirements that the witness in such situations be shown to be unavailable, and that the testimony bears adequate indicia of reliability, in *Ohio v. Roberts*, 448 U.S. 56 (1980). Appendix H.

This Court granted certiorari and vacated the judgment, remanding the case for further consideration in light of *Idaho v. Wright*, 497 U.S. 1021 (1990). Appendix G. On March 8, 1993, the Nevada Supreme Court entered its opinion on remand, again affirming the trial court's admission of the hearsay statements of the child made to her mother and the Las Vegas detective, drawing heavily from *Wright*, *Roberts*, and *White v. Illinois*, 502 U.S. 346 (1992). Appendix F.

Bockting initiated his federal habeas corpus proceeding under 28 U.S.C. § 2254 in 1998. He filed an amended petition in May, 2000, raising the confrontation claim. On March 22, 2002, the district court entered an order denying the confrontation claim, holding that the post-remand decision of the Nevada Supreme Court was neither contrary to, nor involved an unreasonable application of, clearly established federal law, citing *Williams v. Taylor*, 529 U.S. 362 (2000). Appendix E.

Approximately 60 days after oral argument had taken place before a three judge panel of the Ninth Circuit, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). The Ninth Circuit panel then entered an order requiring supplemental briefing on whether *Crawford* applied retroactively to the case. Appendix D. On February 22, 2005, the panel filed its decision granting the writ to Bockting by applying the *Crawford* decision retroactively to his case which went to trial in 1988. Appendix C. On June 1, 2005, the panel denied the Director's motion for panel rehearing, but made amendments to their original decision as the wrong standard for harmless error had been applied. Appendix B. The Director's petition for rehearing en banc was denied by order entered August 11, 2005, with nine judges dissenting. Appendix A.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT CREATED A SPLIT AMONG THE CIRCUIT COURTS BY APPLYING *CRAWFORD V. WASHINGTON* RETROACTIVELY TO A CASE ON COLLATERAL REVIEW IN VIOLATION OF *TEAGUE V. LANE*, AFTER THE SECOND, SIXTH, SEVENTH, AND TENTH CIRCUITS HAD DECIDED THAT *CRAWFORD* WAS NOT RETROACTIVE.

The Ninth Circuit's decision to apply *Crawford* retroactively to a case on collateral review directly conflicts with published opinions in the Second, Sixth, Seventh, and Tenth Circuits that held that *Crawford* does not apply retroactively to such cases, and violates the non-retroactivity rule of *Teague v. Lane,* 489 U.S. 288 (1989). In *Crawford*, this Court left open the question of whether that decision applied retroactively under *Teague*. Prior to the denial of rehearing en banc in *Bockting III*, all of the other Circuits that had considered the issue had unanimously held that *Crawford* was not retroactive. *Bockting* created a split among the circuits on this important issue of retroactivity. *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004); *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004).[2]

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[2] Several state appellate courts have also held that *Crawford* is not retroactive to cases on collateral review: *In re Moore*, ___ Cal Rptr. ___ (Cal. App. 4th Dist., Div. 1 2005); *Danforth v. State*, 700 N.W. 2d 530 (Minn. Ct. App. 2005); *In the Matter of the Personal Restraint Petition of Markel*, 154 Wash. 2d 262, 111 P.3d 249 (2005); *State v. Williams*, 695 N.W. 2d 23 (Iowa 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004); *but see State v.*

The Ninth Circuit erred in granting Bockting habeas corpus relief, since, under the *Teague* standard, *Crawford* should not be applied retroactively in a collateral proceeding to a conviction that became final prior to the date of the *Crawford* decision. This Court should grant certiorari in this case in order to provide uniformity of the law regarding this important issue.

II. THE NINTH CIRCUIT'S RULING THAT *CRAWFORD* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW VIOLATES THIS COURT'S RULING IN *TEAGUE V. LANE*, 489 U.S. 288 (1989).

A. New Procedural Rules Generally Do Not Apply Retroactively To Cases On Collateral Review.

The Ninth Circuit erred in applying *Crawford* retroactively to a case on collateral review. In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, the Court held that, in most instances, new rules do not apply retroactively to cases on collateral review. When a decision of this Court announces a new rule, that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, (1987). *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004). As to cases that have become final, the new rule applies only in limited circumstances. New *substantive* rules generally apply retroactively to cases on collateral review. *Bousley v. United States*, 523 U.S. 614, 620-21, (1998) (decisions which narrow the scope of a

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Forbes, 119 P.3d 144 (N. M. 2005) (retroactive under "unique facts and procedural posture").

criminal statute by interpreting its terms); *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (constitutional decisions that place particular conduct or persons covered by the statute beyond the State's power to punish). *Teague*. 489 U.S. at 311.[3] Such rules apply retroactively because they "carry a significant risk that a defendant stands convicted of an act that the law does not make criminal, or faces a punishment that the law cannot impose on him." *Schririo*, 124 S.Ct. at 2522 (internal quotations omitted).

New rules of *procedure*, however, generally do not apply retroactively, as they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, a more "speculative connection to innocence". *Schriro,* 124 S.Ct. at 2522-23. Because of this more speculative connection to innocence, this Court gives retroactive effect "to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding". *Schriro*, 124 S.Ct. at 2523, citing *Saffle*, 494 U.S. at 495. It is not enough that a new procedural rule is "fundamental" in some abstract sense. New procedural rules will be given retroactive effect in a collateral proceeding only when the rule is one "without which the likelihood of an accurate conviction is seriously diminished." *Schriro*, 124 S.Ct. at 2523, citing *Teague*, 489 U.S. at 313. This Court has repeatedly noted that this class of new procedural rules is extremely narrow, and "it is unlikely that any...'ha[s] yet to emerge.'" *Schriro*, 124 S.Ct.

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[3] New substantive rules have sometimes been referred to as an exception to the *Teague* bar to retroactivity. This Court in *Schriro* referred to them as substantive rules not subject to the bar.

at 2523, citing *Tyler v. Cain*, 533 U.S. 656, 667 n.7 (2001). *Accord, Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

B. *Crawford* Announced A New Procedural Rule.

When a State inmate raises a claim in a collateral proceeding that implicates *Teague*, the first foundational task is to determine whether the relief sought would create, or would require the retroactive application of, a "new rule" for purposes of *Teague*. *Sawyer*, 497 U.S. at 233. A case announces a new rule when it "breaks new ground or imposes a new obligation on the States or the Federal Government;" a case announces a "new rule" of constitutional law if the result "was not *dictated* by precedent existing at the time defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original). *Accord, Saffle*, 494 U.S. at 488.

Crawford constitutes a new rule, as it definitively changed the process for deciding when, and whether, hearsay testimony is admissible. To constitute a new rule, the superseding rule need not amount to a radical departure from its predecessor. This Court has held that it is enough if the new rule amounts to a "modification" of the former rule. In *Teague* itself the Court made the observation that, in setting forth a more detailed process for challenging a prosecutor's peremptory challenges at trial, it "modified" its earlier decision, yet still held it was a new rule. *Compare Batson v. Kentucky*, 476 U.S. 79 (1986) *with Swain v. Alabama*, 380 U.S. 202 (1965). *Batson* did not change the Equal Protection principle of *Swain*, or the constitutional policy behind the general rule. What changed with *Batson* was the *mechanics* of the showing that was required to be made in order to state such a claim before the trial court.

The *Crawford* rule represents a greater departure from existing law than is illustrated by the change in the mechanics of stating a claim from *Swain* to *Batson*. *Crawford* was not dictated by existing law. The *Crawford* Court described its decision as revising existing law to reflect more accurately the original understanding of the Confrontation Clause. In so doing, it explicitly rejected the "particularized guarantees of trustworthiness" test of *Roberts* and its progeny:

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' 448 U.S., at 66, 65 L. Ed. 2d 597, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: it admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations...The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one...

Crawford, 541 U.S. at 60-62.

These words stand as a clear condemnation of the *Roberts* rule. The Court rejected the "open-ended balancing test" it

had applied in *Roberts* and replaced it with a "categorical constitutional guarantee" that the Court ruled was constitutionally prescribed. *Crawford*, 541 U.S. at 67. The Court expressly elected to overrule *Roberts*, instead of following it by simply reweighing its reliability factors and finding that the particular evidence at issue fell short. *Crawford*, 541 U.S. at 66-67. Clearly, a decision announces a new rule if it expressly overrules a prior decision. *Graham v. Collins*, 506 U.S. 461, 467 (1993).

Under these principles, *Crawford* announced a "new rule" within the meaning of *Teague*. Indeed, the concurring Justices in *Crawford* characterized the opinion as a "new rule" that overruled *Roberts*. *Crawford*, 541 U.S. at 75 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

Further, *Crawford* is a procedural rule. *Crawford* does not articulate any prohibition on the power of a criminal law-making authority to proscribe individual conduct. Because the *Crawford* rule does not alter the range of conduct or the class of persons that the law punishes, it is a procedural rule. *See Bousley*, 523 U.S. at 620-21 (explaining distinction between substantive and procedural rules.)

C. The *Crawford* Rule, Although Significant, Is Not A Watershed Rule.

Crawford did not create a watershed rule. *Crawford* is not watershed because (1) infringement of the rule does not seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule does not alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001).

As the dissent in *Bockting III* stated, "Almost any new rule will work to a criminal defendant's advantage in some circumstances." *Bockting*, 418 U.S. at 1056. That dissent illuminated the court's core error of confusing a fundamental, pre-existing *underlying* right with a new rule *premised on that right* by noting further that "[*Crawford*] did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right." *Bockting*, 418 F.3d at 1056. The *Crawford* Court identified the Sixth Amendment Confrontation Clause as a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. However, this does not mean that the rule adopted in *Crawford* is itself a bedrock procedural guarantee, just as *Batson's* dependence on the bedrock principle of Equal Protection did not mean that its new rule was a bedrock rule. It was not. As the United States Court of Appeals for the Tenth Circuit has noted: "Not every holding that draws on a wellspring rule is itself a wellspring holding." *Johnson v. McKune*, 288 F.3d 1187, 1199 (10th Cir.), *cert. denied*, 537 U.S. 1050 (2002) (citations omitted.)

Although the Confrontation Clause, itself, is a "bedrock procedural element," procedural rules announcing how to implement the Clause, those that "reshape the contours of that right" do not themselves qualify as bedrock rules. While cross-examination may be seen as a tool or procedure for determining the reliability of testimony in criminal trials, *Crawford*, 541 U.S. at 61-62, this Court recognized in *Crawford* that confrontation does not necessarily, ipso facto, result in any increased accuracy at all: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular *manner*: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

Moreover, the standard set forth in *Roberts* which was replaced by the new rule in *Crawford*, was expressly focused on that *same* issue—reliability and accuracy, albeit under a different process. In fact, reliability was the *core* goal of the *Roberts* test. In both instances, reliability and accuracy are core interests. Only the process has changed. The concurring Justices noted in *Crawford* that the Court was adding little to a trial's truth-finding function by requiring cross-examination instead of utilizing the procedure of *Roberts*. *Crawford*, 541 U.S. at 75 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment). Indeed, the concurring justices noted that, in many cases, cross-examination may prove to be no more than "superfluous" or to offer an "incidental benefit" at best. *Id.*, at 75.

The watershed element of the exception does not apply to every rule that promotes accuracy, or that guarantees due process. Cf. *Tyler*, 533 U.S. at 667 n.7; *Sawyer*, 497 U.S., at 242-44, (rule of *Caldwell v. Mississippi* held not retroactive to cases on collateral review despite rule's clear attempt to improve accuracy and reliability of capital sentencing proceedings). "The *Caldwell* rule was designed as an enhancement of the *accuracy* of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings." *Sawyer*, 497 U.S. at 244) (emphasis added).

Crawford likewise does not alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Crawford* did not establish the right to confrontation; it "reshaped its contours" in one specific instance. The second *Teague* exception applies to watershed rules of criminal procedure that are "necessary to the fundamental fairness of the criminal proceeding." *Sawyer*, 497 U.S. at 241-42. Such a rule must alter our understanding

of the "bedrock procedural elements essential to the fairness of a proceeding." *Id.* at 242. Indeed, as the dissent in *Bockting III* notes, this Court has applied *just one* "new rule" decision retroactively, that of the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963). That the *Crawford* rule cannot match the wholly fundamental nature of *Gideon's* guarantee of counsel cannot be debated.

Since the adoption of *Teague's* stringent test more than sixteen years ago, this Court has *never* found that any rule falls within the watershed definition, during which time it has had at least eleven opportunities to do so. *United States v. Mandanici*, 205 F.3d 519, 529 (2d Cir. 2000) ("Beginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule retroactively.")

The Ninth Circuit has noted that this Court in *Saffle* indicated that the guarantee of counsel in criminal trials established in *Gideon* was an example of the kind of rule that would fall within *Teague's* second exception. *Leavitt v. Arave*, 371 F.3d 663, 679 (9th Cir. 2003). And yet, as set forth above, and as reiterated by the dissent in *Bockting III*, this Court stated in *Schriro*, 124 S.Ct. at 2523 well *after Crawford*, "it is unlikely that *any* has yet to emerge." *See Tyler*, 533 U.S., at 667, n.7.

This Court has held that error arising from violation of the Confrontation Clause is subject to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, (1986). *Crawford* cannot be a watershed rule if confrontation violations can be harmless. *Brown*, 381 F.3d at 1226-27. *Murillo*, 402 F.3d at 791. *See also Coleman v. United States*, 329 F.3d 77, 89-90 (2d Cir.), *cert. denied*, 540 U.S. 1061

(2003) ("it would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural'--i.e., that they do not inherently deprive defendants of 'basic protections,' or 'substantial rights' -- and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure") (citations omitted); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), *cert. denied*, 537 U.S. 1098 (2002). Nothing in *Crawford* suggests otherwise. Because violations of the Confrontation Clause do not constitute structural error, the second *Teague* exception is not implicated. Although *Crawford* provides defendants with significant procedural protections in criminal proceedings, the standard required to apply a rule retroactively is extremely high, and has not been met here.

III. THE NINTH CIRCUIT CREATED A SPLIT AMONG THE CIRCUITS BY RULING THAT 28 U.S.C. § 2254 (d) (1) AND (2) ADOPTED THE *TEAGUE* EXCEPTIONS FOR PRIVATE CONDUCT WHICH IS BEYOND CRIMINAL PROSCRIPTION, AND WATERSHED RULES, AND IN SO DOING, THE NINTH CIRCUIT MISREAD THE STATUTE.

A. The Ninth Circuit's decision created a split with the Fourth and Seventh Circuits where they previously held in published decisions that the statute does not recognize *Teague's* exceptions.

The Ninth Circuit below held that Bockting's petition should be granted on the second basis that, under a separate A.E.D.P.A. analysis, 28 U.S.C. § 2254 (d) (1) and (2) adopted the *Teague* exceptions which permit retroactive application of new rules in collateral proceedings which either place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to

proscribe or are watershed rules of criminal procedure. The Ninth Circuit in *Bockting I* held:

> The Supreme Court has yet to address whether AEDPA was intended or should be read to adopt the Teague exceptions...As noted earlier, the Court has clarified that the Teague and AEDPA inquiries are separate. Horn [v. Banks], 536 U.S. at 272, 122 S.Ct. 2147. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context.

Bockting I, 399 F.3d at 1021.

This holding is erroneous, and created a split among the Circuit Courts on this important issue, left open by the Court, where the Seventh Circuit and the Fourth Circuit previously held that the *Teague* exceptions could not be read into the statute:

> The question, rather, is whether an error occurred in the first place, and § 2254(d)(1) means that only rules articulated by the Supreme Court of the United States *before* the state court rendered its decision may be applied on collateral review. Section 2254(d)(1) differs from *Teague* because the new statute closes the escape hatches in Teague; at all events, we do not think it likely that the Supreme Court will declare that the elimination of all strategic uses of peremptory challenges is a foundational principle on a par with the right to counsel. If this right is to be established at all, then, it must be established on direct review. But the Supreme Court denied *Gosier's* petition for certiorari from the decision affirming his conviction

> and sentence, see *Gosier v. Illinois*, 504 U.S. 987, n112 S.Ct. 2970, 119 L.Ed. 2d 590 (1992), and at that point the door closed to the recognition of new legal theories.

Gosier v. Welborn, 175 F.3d 504, 510 (7th Cir. 1999). Accord, *Bintz*, 403 F.3d at 868; *Murillo*, 402 F.3d at 789. Likewise, in *Ramdass v. Angelone*, 187 F.3d 396, 406-07 (4th Cir. 1999), the Fourth Circuit held that §2254(d)(1), which requires that the state court decision at issue be inconsistent with clearly established Federal law as determined by the Supreme Court, imports an anti-retroactivity principle into federal habeas law, resembling, but *not simply codifying*, the retroactivity doctrine of *Teague*, a principle that is more stringent than *Teague* in that *it does not recognize Teague's two traditional exceptions*.

B. The Ninth Circuit erred in holding that § 2254(d) adopted the *Teague* exceptions.

Moreover, the decision misinterprets the clear language of the statute. 28 U.S.C. § 2254 (d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The 1996 A.E.D.P.A. amendments fundamentally changed the landscape of federal habeas corpus practice. This Court has recognized that one purpose of the A.E.D.P.A. amendments was to "circumscribe[]" the ability of a federal court to review a State court's habeas decision. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). There is no evidence in the language of the statute, or this Court's decisions on the meaning of the term "clearly established Federal law" to support the Ninth Circuit's holding that the statute adopts *Teague's* exceptions. In determining the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in § 2254 (d)(1), the Court explained that the statute meant no more than it expressly commanded. The statute:

> Refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). In other words, 'clearly established Federal law' under §2254 (d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. See id., at 405, 413, 120 S.Ct. 1495; *Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed. 2d 914 (2002).

Andrade, 538 U.S. at 71-72. The plain language of the statute and this Court's decision in *Andrade* are dispositive. In its ruling below where it read into this statute words that Congress did not set forth, and declared an expanded interpretation clearly at odds with this Court's unambiguous

holding in *Andrade*, the Ninth Circuit clearly violated the foundational principle of statutory construction that courts cannot add words to a Congressional enactment. Recently, in construing another A.E.D.P.A. provision relevant to the issue of retroactivity, this Court held that the words of the statute must control:

> Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted. '[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' *Tyler v. Cain*, 533 U.S. 656, 663, n.5, 121 S.Ct. 2478, 150 L.Ed. 2d 632 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds').

Dodd v. United States, ___ U.S. ___, 125 S.Ct. 2478, 2483 (2005).

Because this Court has defined the phrase "clearly established Federal law" to mean decisions of the Court *"as of the time of the relevant state-court decision"*, the Ninth Circuit, in it's A.E.D.P.A. analysis, erred in rewriting the terms of the statute. Moreover, the Ninth Circuit's mistaken conflation of the statute with *Teague* conflicts with this Court's command that the phrase "clearly established Federal law" bears only a *slight connection* to our *Teague* jurisprudence", while placing new constraints on the power of federal courts to grant State inmates' habeas applications. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (emphasis added).

CONCLUSION

This Court should accept certiorari in this case to resolve the conflict that now exists between the Ninth Circuit and every other circuit that has decided the *Teague* question of the retroactivity of *Crawford*, and further to resolve the conflict that now exists among the circuits regarding the question of whether § 2254(d) adopts the *Teague* exceptions. This case involves an important and recurring issue in our criminal justice system that should be addressed for the sake of uniformity of the law. The Petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-15866

[Filed August 11, 2005]

MARVIN HOWARD BOCKTING,
Petitioner-Appellant,

v.

ROBERT BAYER,
Respondent-Appellee.

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

Judge McKeown votes to deny the petition for rehearing en banc, and Judge Noonan so recommends. Judge Wallace recommends granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc, but the matter failed to receive a

majority of the votes of the nonrecused active judges in favor of en banc rehearing.

The petition for rehearing en banc is **DENIED.**

DISSENT

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, KLEINFELD, GRABER, GOULD, TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc.

Judge Wallace's dissent ably explains why the court errs in holding that the new rule established in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 158 L. Ed. 2d 177 (2004), applies retroactively. *See Bockting v. Bayer*, 399 F.3d 1010, 1024 (9th Cir. Feb. 22, 2005) (Wallace, J., concurring in part and dissenting in part). I write only to add a few additional reasons why I believe the majority's holding--which conflicts with the conclusion of all five other circuits to have reached the issue, *see infra* at 10406-07--is in serious tension with the retroactivity jurisprudence of the Supreme Court as well as our own court. With respect, I believe that we have erred in failing to rehear this case en banc.

I

A

The last time the Supreme Court had occasion to reverse this circuit's holding that a new rule of criminal procedure applied retroactively, it instructed us as follows: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2523, 159 L. Ed.

2d 442 (2004) (internal quotation marks, brackets, and citation omitted). It seems to me that the majority ignores the emphasis that the Court itself placed on the word "seriously." Almost any new rule will work to a criminal defendant's advantage in some circumstances. The question, though, is whether *Crawford*'s new rule is of the magnitude of the one ruling that the Court has told us *would* apply retroactively--namely, the one articulated in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), that a defendant has the right to be represented by counsel.

Yet *Crawford* hardly bears comparison with *Gideon*. To deny a criminal defendant charged with a serious crime the benefit of counsel is to put him awash in a sea of doctrines, deadlines, and technicalities, in which his ability to defend his own interest is highly unlikely to survive. While we value individual autonomy enough to permit defendants to represent themselves when they so insist, *see Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), we do so knowing that such autonomy comes at a serious cost to our confidence in the ultimate verdict. *Id.* at 833. It is thus reasonable to say that, without counsel, "the likelihood of an accurate conviction is *seriously* diminished."

The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), in which out-of-court statements not subject to cross-examination were admissible if they bore adequate indicia of reliability, and the new regime in which they are *per se* inadmissible, is small in comparison to the difference between giving a defendant competent counsel and giving him none at all. *Cf. Sawyer v.*

Smith, 497 U.S. 227, 244, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) ("But given that [the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985),[1]] was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness' of the type that may come within *Teague*'s second exception." (citation omitted)). It is thus apparent that the "narrow right . . . that [Crawford] affords to defendants in a limited class of . . . cases . . . possesses little of the 'watershed' character envisioned by *Teague*'s second exception." *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997).

B

Indeed, *Crawford*'s rule does less to decrease the chance of an inaccurate conviction than many rules that have been held *not* to apply retroactively. Most recently, in *Schardt v. Payne*, ___ F.3d ___, 2005 U.S. App. LEXIS 13569 (9th Cir. 2005), we refused to give retroactive effect to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which invalidated state sentencing guidelines that increased a defendant's sentence based on facts found by a judge by a mere preponderance of the evidence. *Id.* at 2537-38. The application of a mere *preponderance* standard instead of the reasonable-doubt standard required by *Blakely* surely increases the likelihood of inaccurate criminal punishment more than the admission of evidence under the *Roberts* test

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[1] *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

did.[2] *Cf. Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S. Ct. 1951, 32 L. Ed. 2d 659 (1972) (per curiam) ("[T]he reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual error." (quoting *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); *id.* at 205 ("[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."). If even the standard-of-proof aspect of *Blakely* does not satisfy the *Teague* test, I do not see how *Crawford* can do so.

C

Also instructive is *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993), in which the Supreme Court considered the retroactivity of the Seventh Circuit's

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[2] Of course, *Blakely* relates to the accuracy of sentences, not underlying convictions. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (relying, in part, on that difference in holding *Apprendi* not to apply retroactively). I do not see how the difference can be material, though, when the point of *Blakely* and the entire line of jurisprudence stemming from *Apprendi* is precisely that sentencing factors must be treated as elements of a crime when they increase the defendant's maxi-mum sentence. Moreover, the Supreme Court has not distinguished between sentences and convictions when applying *Teague*; rather, it has implied that a watershed rule could be retroactive under *Teague* if it "seriously diminished the likelihood of obtaining an accurate determination in [a] sentencing proceeding." *Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (first alteration in original) (internal quotation marks omitted).

holding that certain jury instructions in Illinois violated due process because they "allowed the jury to return a verdict of murder even if the jury made findings that should have resulted in a verdict of voluntary manslaughter," *Falconer v. Lane*, 905 F.2d 1129, 1130 (7th Cir. 1990). Under the challenged instructions, the Seventh Circuit had noted, "no matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict." *Id.* at 1136. Applying *Teague*, the Supreme Court noted that "the *Falconer* court expressed concern that the jury might have been confused by the instructions in question," but nevertheless refused to apply the rule retroactively because it did not "fall[] into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Gilmore*, 508 U.S. at 345 (quoting *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993)).

Thus even a rule forbidding a jury instruction that concededly permits the jury to convict the defendant of a crime he did not commit is insufficiently fundamental and accuracy-enhancing to warrant retroactive application under *Teague*. Again, the *Bockting* majority's holding is in serious tension with that of the Supreme Court. The only evidence admissible before *Crawford* but now excluded consists of out-of-court testimonial statements that trial and appellate courts have explicitly found to bear adequate indicia of reliability. It is difficult to see how the introduction of such evidence could be more likely to lead to the conviction of an innocent defendant than a set of jury instructions that significantly misdefine the substance of the crime.

D

The *Bockting* majority points out, of course, that the *Craw-ford* Court severely criticized the 'indicia of reliability' test that held sway under *Roberts*. And so it did. *See Crawford*, 541 U.S. at 62-65. The Court's criticism, however, is primarily of the test's doctrinal unmanageability, *see id.* at 63 (criticizing the *Roberts* test as "unpredictable" and "amorphous"), and its incompatibility with the Framers' intentions, *see id.* ("The unpardonable vice of the *Roberts* test [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."); *id.* at 65 (conceding that "most of the usual safeguards of the adversary process attend the [admitted out-of-court] statement" but noting that "the single safeguard missing is the one the Confrontation Clause demands.") Neither of those criticisms goes directly to the crucial question, which is whether "the likelihood of an accurate conviction is *seriously* diminished" when evidence is admitted under the *Roberts* test.

The test may have been unpredictable *at the margins*, as almost any balancing test will be to one degree or another, but nothing in the *Crawford* opinion suggests that trial and appellate judges were likely to admit clearly unreliable evidence in anything but the exceptional case. Indeed, the Court stated that the vagueness of the *Roberts* test "might be a small concern in run-of-the-mill . . . prosecutions," even if it could leave defendants unprotected in "great state trials" in "politically charged cases like [Sir Walter] Raleigh's." *Id.* at 68.

Nor, of course, can the Court's emphasis on the stark incompatibility between the *Roberts* test and the Framers' understanding of the Confrontation Clause be taken to imply

that the *Roberts* test dramatically increases the likelihood of an inaccurate conviction. "That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction." *Bockting*, 399 F.3d at 1029 (Wallace, J., concurring in part and dissenting in part); *cf. Crawford*, 541 U.S. at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner.").

E

In that respect and others, *Crawford*'s rule resembles nothing so much as the *last* new rule we held to apply retroactively, only to be quickly reversed by the Supreme Court. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), we gave retroactive application to the Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that juries and not judges must determine the existence of any aggravating factor necessary for imposition of the death penalty. *See Summerlin*, 341 F.3d at 1108-21. In *Ring*, the Court had emphasized that "the guarantees of jury trial in the [Constitution] reflect a profound judgment about the way in which law should be enforced and justice administered." 536 U.S. at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). The Court had thus held that the Constitution reflects the Founders' insistence that the fairness and accuracy of criminal prosecutions (and imposition of the death penalty) are best guaranteed by giving the defendant the ability to insist that relevant facts be decided by a jury. *See id.*; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (noting that jury factfinding is

necessary "to guard against a spirit of oppression and tyranny on the part of rulers.").

Nevertheless, when we held that *Ring* applied retroactively because it was a watershed decision of criminal procedure without which the fairness and accuracy of a death sentence were seriously diminished, *see Summerlin*, 341 F.3d at 1108-21, the Supreme Court quickly reversed us. *See Summerlin*, 124 S. Ct. at 2524-26. Even though the Constitution demands factfinding by juries--and even though juries *may*, in fact, be more accurate factfinders than judges--the Court held that there is not sufficient evidence to demonstrate that "judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct that the law does not reach." *Id.* at 2525 (internal quotation marks and brackets omitted).

A parallel principle governs this case: even though the Confrontation Clause demands the exclusion of out-of-court testimony--and even though blanket exclusion of such testimony may, in fact, be more accurate than the more nuanced rule of *Roberts*--there is little reason to think that judicial determination of reliability so seriously diminishes accuracy as to make likely the conviction of the innocent. If *Apprendi*, *Ring*, and *Blakely*, with their massive implications striking to the core of our system of criminal justice, were not watershed rules with retrospective application, then surely the *relatively* minor--though still quite significant--change wrought by *Crawford* is not either.[3]

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[3] The Seventh and Tenth Circuits have each argued that the watershed status of the *Crawford* rule is further belied by the fact that violations of the Confrontation Clause are subject to harmless-error review and thus are not structural error on par with the denial of counsel. *See Brown v. Uphoff*, 381 F.3d 1219 at 1226-27;

II

And such has been precisely the conclusion of every other circuit to have considered the question. *See Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. Feb. 23, 2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. Apr. 1, 2005); *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. Apr. 7, 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *see also Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (strongly suggesting that *Crawford* does not apply retroactively). It was the conclusion reached by Judge Wallace in his convincing dissent. *See Bockting*, 399 F.3d at 1024 (Wallace, J., concurring in part and dissenting in part). It was the unanimous conclusion of three judges of this court in an earlier, unpublished disposition. *See Hiracheta v. Att'y*

Murillo v. Frank, 402 F.3d 786 at 791. The *Bockting* majority rejects this reasoning, arguing that even non-structural constitutional rules can constitute watershed, bedrock rules of procedure. *See Bockting*, 399 F.3d at 1020. Whether or not the majority is correct, though, its holding flatly contradicts our holding and reasoning in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi* did not apply retroactively on collateral review. The *Sanchez-Cervantes* panel concluded that "by applying harmless error analysis . . . to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule." *Id.* at 670. The *Bockting* majority does not even cite *Sanchez-Cervantes*, and--whether or not the rationale in that case was correct--the conflict between the two opinions provides another reason to rehear *Bockting* en banc.

Gen'l, 105 Fed. Appx. 937, 938 (9th Cir. 2004) (unpublished memorandum disposition).[4]

Even the Supreme Court itself has indirectly suggested that the *Crawford* rule is not retroactive. In its opinion in *Summerlin*--issued well *after Crawford* and written by Justice Scalia, who also authored the opinion in *Crawford*--the Court stated that the class of retroactively applicable rules "is extremely narrow, and it is unlikely that *any* has yet to emerge." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks, ellipsis, and brackets omitted) (emphasis added) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)). The *Bockting* majority argues that this pronouncement from the Court "offer[s] discouragement but no guidance." *Bockting*, 399 F.3d at 1016. But we treat even Supreme Court dicta with "due deference," *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996), and the Court's statement suggests that our holding that *Crawford* applies retroactively is likely to meet the same fate as our similar holding in *Summerlin* with regard to *Ring*--namely, speedy reversal.

The two-judge *Bockting* majority thus stands alone in its conviction that *Crawford* applies retroactively. Its holding will have serious consequences: it will open the door for a slew of habeas petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements. Concerns about taxing the state and federal governments'

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[4] I cite *Hiracheta* not as precedent, of course, but because a conflict with a previously issued memorandum disposition is a factor weighing in favor of rehearing en banc. *See* Ninth Circuit Rule 36-3(b)(iii).

resources to retry convicted criminals should not prevent us from granting writs of habeas corpus when the Constitution requires it. But those concerns certainly counsel us to consider very carefully any precedent that will lead to the granting of an unknowable--but likely large--number of such writs. *See Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 2511, 159 L. Ed. 2d 494 ("In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." (quoting *Teague v. Lane*, 489 U.S. 288 at 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334) (citations omitted)).

III

Because *Bockting* conflicts with the decision of every other circuit to have considered the retroactivity of *Crawford*; because it conflicts with our own decision in *Hiracheta*; and, most of all, because it was wrongly decided, I respectfully dissent from our order denying rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-15866

[Filed June 1, 2005]

MARVIN HOWARD BOCKTING,
Petitioner-Appellant,

v.

ROBERT BAYER,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding
D.C. No. CV-98-00764-ECR

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

The opinion filed February 22, 2005, slip op. 1991, and appearing at 399 F.3d 1010 (9th Cir. 2005), is amended as follows:

At 399 F.3d 1022, slip op. 2012, strike the last paragraph of Part II. Substitute the following paragraph:

> The final question is whether admission of Autumn's statement "had substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing, and weaknesses in Laura Bockting's testimony. Even if Autumn's statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant as corroborating evidence that its admission had a substantial and injurious effect or influence in determining the jury's verdict. Thus, the admission of Autumn's statement requires reversal.

The petition for panel rehearing is DENIED. The petition for rehearing en banc is pending before the Court. No further petitions may be filed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-15866

[Filed February 22, 2005]

MARVIN HOWARD BOCKTING,
Petitioner-Appellant,

v.

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Appeal from the United States District Court
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Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

OPINION

McKEOWN, Circuit Judge

Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Autumn's statements at the interview contradicted her testimony at a preliminary hearing where she claimed not to remember what happened with her father. Admission of the interview evidence without cross-examination violated Bockting's constitutional right "to be confronted with the witnesses against him." U.S. Const. amend. VI.

Although this case has been before the Nevada Supreme Court twice and before the United States Supreme Court on one occasion, resolution now rests on interpretation of an intervening Supreme Court case: *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court definitively held that "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." 124 S. Ct. at 1369. Because the little girl's testimony, which was not subject to cross-examination, was central to the conviction, its admission can hardly be classified as harmless error. *Crawford* dictates reversal.

The thorny issue is whether *Crawford* applies retroactively to this state habeas appeal. In an earlier case, we reserved this question for future consideration. *See Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (per curiam). If, as Judge Noonan argues, *Crawford* simply reiterates a longstanding

rule and does not announce a new rule, then retroactivity falls out of our analysis. If, on the other hand, *Crawford* is characterized as a "new rule," then we are faced with analyzing the retroactivity of *Crawford* in the framework of yet another recent Supreme Court case, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). New rules apply retroactively only where they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or where the new rule is "implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The latter category is "reserved for watershed rules of criminal procedure." *Id.* at 311.

The threshold question is whether *Crawford* constitutes a "new rule" under *Teague*. Judge Noonan's approach--namely that *Crawford* does not announce a new rule but rather is a "correction of a misinterpretation," Concurrence at 2015--has a certain appeal in light of the Court's historical emphasis in *Crawford*. Indeed, one can read *Crawford* as intimating that the rule is longstanding. Unfortunately, Justice Scalia's analysis is not entirely consistent with that viewpoint. Nonetheless, characterizing *Crawford* as something less than a new rule, as Judge Noonan does, is one legitimate way of interpreting *Crawford*. To do so leads to the same result here--the application of *Crawford* to Bockting's pending habeas claims.

Despite the appeal of Judge Noonan's reasoning, application of the Supreme Court's guidance in *Teague* leads to the conclusion that *Crawford* announces a "new rule." Because the *Crawford* rule is both a "watershed rule" and one "without which the likelihood of an accurate conviction is

seriously diminished," *Summerlin*, 124 S. Ct. at 2523, the rule is retroactive.

I. FACTUAL BACKGROUND

Marvin Bockting lived with his wife, Laura, and his two daughters, Autumn and Honesty, in a motel in Las Vegas. Autumn had taken showers together with Laura and Bockting. She had also seen them having sex, and she was accustomed to the use of sexual language.

One Saturday night, when Laura was at home alone with the children, Autumn Bockting woke up crying. Her mother observed that "she looked like she had just woken up from a bad dream and she was quite upset." At first she refused to tell Laura what was wrong. Laura asked why she wouldn't tell. Autumn told her, "Because daddy said that you would make him leave and that he would beat my butt if I told you." After reassurance from her mother, Autumn said "daddy put his pee-pee in her pee-pee, and that daddy put his pee-pee in her butt, and daddy made her suck on his pee-pee like it was a sucker."

The next day, Laura confronted Bockting. She asked him to leave, which he did. Two days later, a Tuesday, Laura called the rape crisis hotline and was told to take Autumn to the hospital, where they were met by Detective Zinovitch. Zinovitch tried to interview Autumn, but she was too upset. A rape examination was performed. The doctor found that Autum's rectal sphincter had been torn within the past week. She also found that Autumn's hymenal ring was wide open, a rarity in a six-year old. The doctor determined that although she "couldn't determine what kind of instrument or foreign body was used to cause the laxness of the hymen and the fissure of the rectum," it had been caused by a blunt force.

Two days later, Autumn was again interviewed by a detective. She repeated what she had told her mother, accurately describing the positions of the sex acts. She also demonstrated the acts with anatomically correct dolls.

At Bockting's preliminary hearing, Autumn was able to answer questions about the difference between the truth and a lie, but became upset when she was asked about being touched by Bockting. Upon further questioning, she said she could not remember what occurred with her father and did not remember whether she had talked with the detective about the claimed assault. The judge declared Autumn an unavailable witness, and the preliminary hearing proceeded with the testimony of Laura and Zinovitch. At trial, the judge found that Autumn's hearsay statements were admissible because she was effectively unavailable for trial. Without having the opportunity to cross-examine Autumn, Bockting was convicted and sentenced to life in prison.

Bockting appealed to the Nevada Supreme Court, which dismissed his claims. The United States Supreme Court later vacated the Nevada Supreme Court's decision, remanding for consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). In 1993, the Nevada Supreme Court affirmed Bockting's conviction. He filed a second petition for post-conviction relief, which the state district court denied in 1994. Three years later, the Nevada Supreme Court again dismissed the appeal. Bockting then sought relief in federal court. He timely filed a habeas petition in 1998, which he amended in 2000. The district court denied the petition, and Bockting filed the present appeal.

II. DISCUSSION

Because Bockting filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), its provisions apply. *See Woodford v. Garceau*, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Under AEDPA, habeas relief to a state prisoner is available only if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court also directs us that "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *See Horn v. Banks*, 536 U.S. 266, 272, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002). Indeed, as the Court noted, "if our post-AEDPA cases suggest any-thing about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." *Id.*

In explaining *Teague*'s application, the Supreme Court recently explained that there are three steps to determining whether a rule of criminal procedure applies on collateral review:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide

> whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004) (internal citations omitted). Because Bockting's conviction became final in 1993, we must evaluate whether any subsequent rule of constitutional law is new against the benchmark of that year.

A. *CRAWFORD* ANNOUNCED A NEW RULE

The question before us is whether the Confrontation Clause principles stated in *Crawford* amount to a new rule. In *Crawford*, the Supreme Court considered whether Washington State's use at trial of a witness's tape-recorded statement to a police officer violated the Confrontation Clause. 124 S. Ct. at 1357. Writing for the Court, Justice Scalia engaged in a lengthy historical analysis of the Confrontation Clause, noting that "the principal evil at which the Confrontation Clause was directed was the *civil-law mode of criminal procedure*, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 1363 (emphasis added). He went on to emphasize "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and* the defendant had had a prior opportunity for cross-examination." *Id.* at 1365 (emphasis added).

Whether the rule in *Crawford* is new depends on whether it "was *dictated* by the then-existing precedent." *Beard*, 124 S. Ct. at 2511. To be sure, the majority in *Crawford* is somewhat opaque as to the categorization of its ultimate holding. As the Court noted, "although the results of our decisions have generally been faithful to the original meaning

of the Confrontation Clause, the same cannot be said of our rationales." 124 S. Ct. at 1369. The puzzler is whether the "results of [the Supreme Court] decisions" are coextensive with the rules of those decisions. If so, then the *Crawford* pronouncement could be legitimately viewed as a continuation of Supreme Court jurisprudence. Careful scrutiny of the *Crawford* opinion suggests otherwise for at least two reasons: (1) *Crawford* deviates from the test announced in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); and (2) simply reaching the right "result" does not mean that the result flowed from a constant rule.

As the Court observed, "*Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears particularized guarantees of trustworthiness." *Crawford*, 124 S. Ct. at 1369 (quoting *Roberts*, 448 U.S. at 66). *Roberts* rests on evidentiary principles of reliability and trustworthiness rather than on the constitutional principle of confrontation.

The *Crawford* majority quite clearly states that the *Roberts* "test departs from the historical principles" in that it is both "too broad" and "too narrow." *Crawford*, 124 S. Ct. at 1369. *Crawford* did not announce the same rule as *Roberts*. Whereas *Roberts* countenanced the admission of witness testimony if trustworthy, under *Crawford* the testimony is admitted only if the witnesses are subject to cross-examination. The Court concluded that the cases applying *Roberts* have "remained faithful to the Framers' understanding," *id.* at 1369, that testimonial statements are admissible only when two criteria are met: unavailability and opportunity for cross-examination. In other words, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.*

at 1374. Although historical principles are the bedrock for the *Crawford* decision, getting back to the bedrock required the Court to disavow the *Roberts* test. The dissent in *Crawford* mirrors this view by concluding that "the Court of course overrules *Ohio v. Roberts*," *id.* at 1378, and criticizing the "Court's adoption of a new interpretation of the Confrontation Clause. . . . ," *id.* at 1374.

To say that the outcomes or "results" have been generally "faithful to the original meaning" is not the same as saying that there has been a consistent rule throughout our history. Indeed, the *result* in an individual case may well be consistent with the Supreme Court's new interpretation of *Crawford*, but that does not mean that the rule that dictated the prior result is necessarily consistent with *Crawford*. The majority in fact underscores the dichotomy between outcomes and rules in announcing that, "if nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached." *Id.* at 1369 n.9. Rules and outcomes are neither the same nor wholly overlapping.

Finally, the Court in *Crawford* pinpointed a situation that was, in fact, "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial." *Id.* at 1368 n.8. Citing *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), the Court described a case remarkably similar to ours, in which "statements of a child victim to an investigating police officer [were] admitted as spontaneous declarations." *Id. White* rested on the issue of the unavailability requirement under the Confrontation Clause; had *Crawford* been the rule at the time, the lack of cross-examination would have been fatal to the admission of the evidence.

Although the long line of Confrontation Clause cases is "faithful to the original meaning" of the clause, *id.* at 1369, we cannot overlook *Roberts* and *White*. On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that *Crawford* announces a new rule that must be put through the *Summerlin* strainer. If, on the other hand, *Crawford* does not announce a new rule--the position taken by Judge Noonan--then the *Summerlin* analysis is not required. Either way, the result in this case is the same. Bockting's petition should be granted.

B. *SUMMERLIN* CONTROLS THE RETROACTIVITY ANALYSIS

Because *Crawford* announces a new rule, we must ask whether it falls into one of the two *Teague* exceptions to the bar on retroactivity. The first *Teague* exception is for primary conduct that cannot be criminalized. The second is for bedrock rules of criminal procedure. *Teague*, 489 U.S. at 307. It is the second exception that is at play in this case.

The *Crawford* rule does not narrow the scope of a criminal statute by interpreting its terms, nor is it a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish. *Summerlin*, 124 S. Ct. at 2522. Rather, the rule in *Crawford* is procedural. *See also Crawford*, 124 S. Ct. at 1370 (stating the Confrontation Clause provides "a procedural rather than a substantive guarantee"). Therefore, *Crawford* merits retroactive application only if it implicates "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), and reworks our understanding of bed-rock criminal procedure, *Sawyer v.*

Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

To be sure, under *Summerlin*, the lower courts are tightly constrained in determining whether a new rule is a "watershed rule" that is not only fundamental, but one "without which the likelihood of an accurate conviction is seriously diminished." *Summerlin*, 124 S. Ct. at 2523 (quoting *Teague*, 489 U.S. at 313). Viewing *Crawford* and *Summerlin* together poses a conundrum. Justice Scalia wrote for the majority in both cases. In *Summerlin*, the Court admonished that "this class of [retroactive] rules is extremely narrow, and it is unlikely that any . . . has yet to emerge." 124 S. Ct. at 2523 (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotations omitted). Nonetheless, the bar is not absolute and the *Crawford* rule meets the Court's criteria. Admonitions such as in *Summerlin* offer discouragement but no guidance. Because our job is not to conjure up hidden meaning, we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of *Summerlin*. Viewing *Crawford* in light of *Summerlin* leads to the conclusion that the *Crawford* cross-examination requirement merits retroactive application.

That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question. *Crawford*, 124 S. Ct. at 1359. Hundreds of years of tradition have embedded this notion as a fundamental role. Indeed, "the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Id.* at 1373.

The question next posed is whether the rule implicates the accuracy of the criminal proceeding. Juxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the criminal proceeding," *Saffle*, 494 U.S. at 495, and alters our understanding of bedrock procedural principles, whereas the sentencing scheme in *Summerlin* did not. In *Summerlin*, the Court concluded that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating factors in a death penalty case must be proved to a jury rather than to a judge, was not a retroactive rule. *Summerlin* asked "whether judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (citations and quotations omitted). The answer was no because "the evidence is simply too equivocal to support that conclusion." *Id.*

In *Summerlin*, the Court observed that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[1] In contrast, the

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[1] The Court rejected the notion that the jury trial right seriously impacted accuracy in part because the jury-free civil law system is so prevalent:

> "The mixed reception that the right to jury trial has been given in other countries . . . surely makes it implausible that judicial factfinding so *seriously* diminishes accuracy as to produce an impermissibly large risk of injustice." 124 S. Ct. at 2525 (internal quotations omitted).
>
> Unlike the "mixed reception that the right to jury trial has been given in other countries," *id.*, the right of confrontation is well established in international practice. Justice Scalia noted in *Crawford* that "the right to confront

evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal.

The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy. *See, e.g.*, *Crawford*, 124 S. Ct. at 1370 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth.") (quoting 3 Blackstone, Commentaries * 373); *White v. Illinois*, 502 U.S. 346, 355, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (evaluating a Confrontation Clause claim against the benchmark of accuracy); *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) (describing the "Confrontation Clause's very mission" as "to advance the accuracy of the truth-determining process in criminal trials")

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one's accusers is a concept that dates back to Roman times." *Crawford*, 124 S. Ct. at 1359. He then went on to chronicle the history in England. Although not mentioned in *Crawford*, it bears noting that the right of confrontation is firmly implanted in the jurisprudence of other European countries. For example, the European Convention on Human Rights, articles (6)(1) and (6)(3)(D), give the right "to examine or have examined witnesses against him." The European Court of Human Rights has established a right of confrontation: *Saidi v. France*, 17 Eur. Ct. H.R. 251, 270 (1993) ("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial"). *See also Van Mechelen v. Netherlands*, 25 Eur. Ct. H.R. 647, 673 (1997); *Ludi v. Switzerland*, 15 Eur. Ct. H.R. 173 (1992); *Windisch v. Austria*, 13 Eur. Ct. H.R. 281 (1990); *Delta v. France*, 16 Eur. Ct. H.R. 574 (1990); *Kostovski v. Netherlands*, 12 Eur. Ct. H.R. 434, 448-49 (1989).

(internal quotation omitted); *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (stating the purpose of the Confrontation Clause is to "augment accuracy in the factfinding process"); *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) (plurality) ("The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials."); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'"); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) ("Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."); *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) (describing the "primary object" of the Confrontation Clause as "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). *See also* M. Hale, History and Analysis of the Common Law of England 258 (1713)

(adversarial testing "beats and bolts out the Truth much better") (quoted in *Crawford*, 124 S. Ct. at 1370).

But accuracy and reliability do not exist in a vacuum. Rather, "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. "The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Even more to the point, the Court wrote, "the combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor by the trier of fact--serves the purposes of the Confrontation Clause by *ensuring that evidence admitted against an accused is reliable* and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Id.* at 846 (emphasis added).

Crawford itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach" *Summerlin*, 124 S. Ct. at 2525 (internal quotations omitted):

- "The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 124 S. Ct. at 1371.

- "The [general reliability] test is *inherently*, and therefore *permanently*, unpredictable. *Id.* at 1374 n.10. "It is difficult to imagine [the general reliability framework] providing any meaningful

protection in [politically charged cases]." *Id.* at 1374.

- "We view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373.

Thus, at the heart of the Court's concerns in *Crawford* was the *reliability* of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined. That the rule in *Crawford* is one without which the accuracy of convictions would be seriously undermined is further born out by the Court's own description of its prior doctrine as a "rare case" of "fundamental failure." *Id.* at 1373. The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an "absolute pre-requisite to fundamental fairness." *Sawyer*, 497 U.S. at 244.

In *Crawford*, the Court itself faults the previous regime under *Roberts*. *Crawford*, 124 S. Ct. at 1371-73. Indeed, to benchmark reliability against *Roberts* would undermine *Crawford*'s central thesis. Reliance on *Roberts*' judicially-administered reliability test gives illusory comfort, as "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370, and "the legacy of *Roberts* in other courts vindicates the Framers'

wisdom in rejecting a general reliability exception," *id.* at 1371.[2]

The retroactivity inquiry is not conducted in a vacuum. Rather, the analysis is modeled on the *Summerlin* requirements. But even if a "look back" to *Roberts* were appropriate, as Judge Wallace suggests, *Crawford* would be retroactive.

Rules that are properly considered retroactive are those that "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (internal quotations omitted). As the Court recently stated, "in providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)." *Beard*, 124 S. Ct. at 2514 (citing *Saffle*, 494 U.S. at 495, *Gilmore v. Taylor*, 508 U.S. 333, 364, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (Blackmun, J., dissenting)). Recognizing that bedrock procedural rules are very few in number, it is no leap to conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*.

We join one other circuit that has concluded that *Crawford* announces a new rule, although its retroactivity analysis differs from ours. *See Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004). The Second Circuit did not directly address the

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[2] Judge Wallace's effort to rest the analysis on the reliability test under *Roberts* forces a false dichotomy between reliability and cross-examination and overlooks the fact that "some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." *Id.* at 1372.

new rule issue but concluded that even if *Crawford* did announce a new rule, it would not be retroactive. *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004).

Addressing the question of a new rule, the Tenth Circuit reasoned as follows:

> As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant. Crawford, 541 U.S. 36 , 124 S. Ct. at 1369. Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law. *See Crawford*, at ___, 124 S. Ct. at 1374 (Rehnquist, C.J., dissenting) (referring to the majority's holding as a "new interpretation of the Confrontation Clause").

Brown, 381 F.3d at 1226. Our analysis is in accord.

But the Tenth Circuit diverges from us in holding that *Crawford* is not retroactive because it does not set forth a watershed rule of criminal procedure. *Id.* Stating that unless a new rule is "on the magnitude of the rule announced in *Gideon v. Wainright*," it will not fit within the *Teague* watershed rule exception, the court explained:

> Unlike *Gideon*, *Crawford* does not 'alter[] our understanding of what constitutes basic due process,'

> but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process.

Id. at 1226-27 (internal citations omitted).

The Supreme Court's Confrontation Clause jurisprudence in *Crawford* cannot be dismissed as a mere tweak on the admissibility of hearsay. *See Brown*, 281 F.3d at 1226. The Supreme Court surely did not conceive of it as such. Rather, the Court describes the right of confrontation as a "bedrock procedural guarantee," notes that it "dates back to Roman times" and was part of the common law known to the founding generation. *Crawford*, 124 S. Ct. at 1359. The Court also contrasts "exclusion under the hearsay rules" with "the civil-law abuses the Confrontation Clause targeted." *Crawford*, 124 S. Ct. at 1364. In a rare *mea culpa*, the Court faults itself for not enunciating the *Crawford* rule earlier, stating that "it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373. There is nothing "mere" about the *Crawford* rule.

The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction. *Summerlin*, 124 S. Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. *See*

Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, a rule of constitutional law could be essential to promote accurate convictions, but still subject to harmless error review if the impact of misapplication of the rule were easily measurable. In short, because accuracy and measurability are different concepts, whether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure.

After assuming that *Crawford* announced a new rule, the Second Circuit rejected retroactivity, reasoning that the *Crawford* rule would not improve overall accuracy because "it is likely to improve accuracy in some circumstances and diminish it in others." *Mungo*, 393 F.3d at 335. The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment. The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy, *see, e.g.*, *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985), and thus *Crawford* rejected the *Roberts* framework as reflective of "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion," *Crawford*, 124 S. Ct. at 1373. Viewing these holdings together leads to the conclusion that the *Crawford* rule is one without which the likelihood of accurate conviction is seriously diminished.

C. BOCKTING MERITS RELIEF UNDER AEDPA

Having determined that *Crawford* is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context. Further, it appears that Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions. *See* 28 U.S.C. § 2254(e) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.") But even if Congress' intent is unclear, the constitutional doubt cannon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

The Nevada Supreme Court relied on *Roberts* to conclude that Autumn was "unavailable" and that her statements bore the requisite "particularized guarantees of trustworthiness." *Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1367-70 (Nev. 1993). As we now know, but the Nevada Supreme Court could not have divined, *Crawford* dictates the right to cross-examine the witness. The progeny of *Roberts*, such as the multi-factor reliability test developed in *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (9th Cir. 1990), cannot override the right of confrontation. Thus, the Nevada Supreme Court's decision was "contrary to" established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*.

It bears noting that *Crawford* requires not only cross-examination but unavailability. We have long acknowledged the sensitive situation presented by the child witness. *See, e.g., Tome v. United States*, 513 U.S. 150, 166, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). Indeed, prosecutions for child abuse often rely heavily on such testimony. Here, the trial court's inquiry into Autumn's unavailability was truncated and conclusory at best. When she refused to cooperate, the court simply declared her unavailable. Although this issue is troubling, it is not necessary to reach this question because of the constitutional error related to the lack of cross-examination.

The final question is whether admission of Autumn's statement is harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's

description of Autumn's interview was so significant that the error could have materially affected the verdict. Thus, admitting Autumn's statement was not harmless beyond reasonable doubt.

III. CONCLUSION

Because a majority concludes that *Crawford* must be applied in this pending habeas case, Bockting's petition for a writ of habeas corpus is GRANTED.[3]

CONCURRENCE

NOONAN, Circuit Judge, concurring:

The trial court, the state supreme court, and the federal district court believed that the statute was constitutional, the procedure followed to have been proper, and Bockting's conviction valid. It is now apparent that each of these courts was mistaken and that the statute and the procedure under it are unconstitutional. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Bockting is entitled to a writ of habeas corpus. The misunderstanding of the law governing the case is comprehensible in the light of the history set out in *Crawford*; nontestimonial hearsay is not subject to an absolute bar. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

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[3] I join part II of Judge Wallace's concurring and dissenting opinion with respect to admission of prior misconduct, vouching, and ineffective assistance of counsel.

Autumn was not found to be as unavailable as a witness. She was in fact present at the trial. At most, the Nevada courts determined that Autumn was not willing to be a witness against Bockting. The reasons for her unwillingness were not explored. The possibility of measures short of appearance on the stand in open court were not explored. The fact that she had testified at Bockting's preliminary hearing and had denied the accusations against him was ignored. On the mere ipse dixit of a prosecutor already disappointed by Autumn's testimony at the preliminary hearing, she was disqualified as a witness and the hearsay introduced. The Confrontation Clause of the Sixth Amendment to the Constitution of the United States, applicable by virtue of the Fourteenth Amendment, was violated.

No opportunity for cross-examination by Bockting ever existed. He was, of course, not present when Autumn spoke to her mother or when she spoke to Detective Zinovitch. Totally untested by the method constitutionally required, the two testimonial tales, retold by Laura and the detective, confronted Bockting at his trial. The Confrontation Clause demanded that he be confronted with the witness against him. U.S. Const. amend. VI.

It is a work of supererogation to praise the wisdom of the Founders and to celebrate the enforcement of a "bedrock procedural guarantee." *Crawford*, 124 S. Ct. at 1359. Nonetheless, the circumstances of this case demonstrate how wise it is to exclude testimony untested by cross-examination. Autumn's first declaration, reported only by her mother, was made at night after Autumn awoke from sleep crying and was questioned by her mother. It may have been an excited or spontaneous utterance but one made under circumstances rendering it less, not more credible. In her mother's words, "She looked like she had just woke up from a bad dream and

she was quite upset." It is a commonplace phenomenon for people of all ages to have nightmares and to awake in distress. What they then say was bothering them carries no guarantee of trustworthiness; they are coming out of sleep, still responding to their sleeping state impressions. Autumn's second declaration was made to a police officer in the presence of her mother; she was under psychological compulsion not to let her mother down. As to her play with the dolls and her sexual experience, her mother testified that Autumn had observed her and Bockting having sexual intercourse in the one bedroom trailer in which the family lived and where Autumn slept in a closet area off the bedroom. The language Autumn used in reference to the sexual organs was language her mother testified that she used in discussion with her. Autumn had no motive to accuse her stepfather of criminal assault and, in fact, demonstrated affection for him; she did have a motive to account for her nightmare and to tell the same story the second time when she met the police.

Autumn's statements were further put in doubt by her repudiation of any accusation against Bockting at his preliminary hearing. Further, the report of her statement of her mother must be contextualized by these facts: her mother was an exotic dancer, who sometimes performed in front of Autumn; her mother was in conflict with Bockting and on the brink of leaving him; her mother did not report Autumn's nighttime declaration until two days after she said she heard it.

It is argued that to apply *Crawford* is to apply it retroactively. To the contrary, the Supreme Court, after reviewing its own decisions, declared:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, 124 S. Ct. at 1369. *Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue.

True, the chief justice's dissent declared that *Crawford* was "a new interpretation" that overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Id.* at 1374. But as the Court pointed out, *Roberts* itself only admitted testimony that had been subjected to cross-examination. *Id.* at 1368. Undoubtedly, a number of courts misinterpreted the Confrontation Clause in the same way as the Nevada courts did. But correction of a misinterpretation does not create a new rule. It is dangerous to take literally a dissent. The authentic interpretation of what the Court is doing comes from the Court itself. If there were any doubt in this case (which I deny there is), it is completely dispelled by the Court, again speaking through the author of *Crawford* in the same term in which *Crawford* was decided. Addressing new procedural rules without which the likelihood of an accurate conviction is seriously diminished, the Court declared: "This class of rules is extremely narrow and it is unlikely that any . . . has yet to emerge." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2522, 159 L. Ed. 2d 442 (2004) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (alterations and quotation marks omitted). This declaration is an authoritative determination, delivered less than four months after *Crawford*, that *Crawford's* bedrock procedural rule was not a new rule. A change in rationale is not treated by the Supreme Court as a change in rules. *Crawford*, 541 U.S. 36,

124 S. Ct. 1354 at 1369, 158 L. Ed. 2d 177. All along, the bedrock was there.

As an alternative to the foregoing analysis and in order to provide a precedent for this court, I also concur in Judge McKeown's analysis and opinion.

Because the action of the Nevada Supreme Court resulted in a decision that was contrary to established federal law as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), the writ of habeas corpus should issue to free Bockting from his unconstitutional confinement.

DISSENT

WALLACE, Senior Circuit Judge, concurring and dissenting

Both Judges McKeown and Noonan conclude that the Supreme Court's recent landmark decision, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), governs our consideration of Bockting's Confrontation Clause claim, although for different reasons. While Judge Noonan would hold that retroactivity is "not an issue" because *Crawford* did not establish a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Ante* at 2015, I concur with that part of Judge McKeown's opinion holding that *Crawford* established a new rule that does not apply retroactively to state convictions on habeas review unless it satisfies one of two narrow exceptions. However, I do not agree that *Crawford* fits within either of those exceptions. Guided by the principles outlined in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), I would hold that *Crawford's* new procedural rule does not qualify for

retroactive application and would analyze Bockting's Confrontation Clause claim under pre-*Crawford* jurisprudence. In doing so, I would reject that claim, as well as Bockting's remaining claims, under the deferential standards of review embodied in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and affirm the district court's denial of Bockting's habeas petition.[1] I therefore respectfully dissent.

I.

I consider first Bockting's contention that the state trial court violated his rights under the Confrontation Clause by admitting Autumn's out-of-court statements.

A.

Several weeks after this case was argued before us and submitted for decision, the Supreme Court issued *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Parting ways with the constitutional test formulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *Crawford* held that in criminal proceedings, "testimonial statements of witnesses absent from trial [are admissible] only where the defendant is unavailable, and *only where the defendant has had a prior opportunity to cross-examine*." *Crawford*, 124 S. Ct. at 1369 (emphasis added).

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[1] Judge McKeown concurs in part II of this opinion. *See* Ante at 2012 n.3. Therefore, a majority of the court agrees that Bockting's challenges to (a) the admission of evidence of prior misconduct, (b) vouching, and (c) effective assistance of counsel, do not warrant habeas relief.

Bockting argues--and Judge Noonan agrees--that *Crawford* does not raise retroactivity concerns at all because it does not qualify as a "new rule" under *Teague*. Although the Supreme Court took great pains to harmonize *Crawford's* result with previous Sixth Amendment decisions, I agree with Judge McKeown that *Crawford's ratio decidendi* effected a clear and decisive break from prior precedent. *See Crawford*, 124 S. Ct. at 1369 (observing that "although the results of our decision have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales"). Before *Crawford*, controlling precedent permitted courts to admit hearsay evidence against a criminal defendant whenever the declarant was "unavailable" and the evidence had "adequate 'indicia of reliability,'" i.e., fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. *Crawford*, however, emphatically rejected *Roberts's* approach to testimonial evidence, arguing that its test demonstrated an "unpardonable . . . capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 124 S. Ct. at 1371. As the Court in *Crawford* explained:

> [*Roberts*] is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability.

Id. at 1369. Responding to these concerns, the Court limited *Roberts's* reach to cases "where nontestimonial hearsay is at issue." *Id.* at 1374. In cases involving "testimonial

evidence," the Court replaced *Roberts* with a new test that has two requirements: "unavailability and a prior opportunity for cross-examination." *Id.* Thus, since *Crawford* overruled *Roberts's* test for the admission of testimonial evidence, the decision also represents a "new rule" for retroactivity purposes. *See id.* at 1378 (Rehnquist, C.J., concurring) (characterizing the majority's opinion as a "new rule"); *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) ("There can be no dispute that a decision announces a new rule if it expressly overrules a prior decision . . . ."); *Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

Crawford's "new" constitutional rule would only apply retroactively to final convictions on collateral review if it falls within certain categories of rules. The Supreme Court recently clarified the nature and scope of these categories in *Summerlin*:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not

> make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

124 S. Ct. at 2522-23 (citations omitted), *quoting Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), *and Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

Measured against *Summerlin's* standards, *Crawford* is best classified as a procedural rule. The rule does not "narrow the scope of a criminal statute by interpreting its terms"; nor does it "place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. Rather, by renegotiating the boundaries between admissible and inadmissible evidence, *Crawford* operates solely on a defendant's criminal *proceedings*. *Crawford's* characterization as a procedural rule is further supported by the *Crawford* decision itself. By labeling the Confrontation Clause as "a procedural rather than a substantive guarantee . . . [that] reflects a judgment . . . about how reliability [of testimonial evidence] can best be determined," the Court endeavored to reinstitute "the constitutionally prescribed *method* of assessing reliability." *Crawford*, 124 S. Ct. at 1370 (emphasis added). While, the line between "substance" and "procedure" may not always be crystal-clear, there can be no serious dispute that *Crawford's* restriction on testimonial evidence is a "procedural" rule.

Bockting contends that *Crawford* merits retroactive application here because it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *citing Teague*, 489 U.S. at 311; *see also Teague* 489 U.S. at 307 (describing this exception as applying to "those procedures that . . . are implicit in the concept of ordered liberty" (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937))). This argument--which Judge McKeown finds persuasive--admittedly has some intuitive appeal; as Bockting observes, the Supreme Court has described "the Sixth Amendment's right of an accused to confront the witnesses against him" as "fundamental," *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), and *Crawford* purports to effectuate the Confrontation Clause's original design and thereby enhance the fairness and accuracy of defendants' criminal proceedings. *Crawford*, 124 S. Ct. at 1373. However, the fact that *Crawford* is "'fundamental' in some abstract sense is not enough" to entitle Bockting to habeas relief. *Summerlin*, 124 S. Ct. at 2523. Under *Teague* and its progeny, *Crawford* does not constitute a "watershed rule" suitable for retroactive application unless the *Roberts* test "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." *Id.* at 2525, *quoting Teague*, 489 U.S. at 312-13; *see also id.* at 2523 ("This class of rules is extremely narrow, and 'it is unlikely that any . . . ha[s] yet to emerge.'" (*quoting Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotation marks and citation omitted)).

In evaluating the *Roberts* test, the Supreme Court's analysis in *Summerlin* is instructive. The question presented there was whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court's decision that

juries must determine the existence of any aggravating factor necessary for imposition of the death penalty, applied retroactively to cases already final on direct review. In assessing whether *Ring* represented a true "watershed" procedural rule, the court reviewed scholarly commentary relating to the accuracy of judicial factfinding and concluded that the evidence was "simply too equivocal" to justify *Ring's* retroactive application: "when so many presumably reasonable minds continue to disagree over whether juries are better factfinders . . ., we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Summerlin*, 124 S. Ct. at 2525. The Court also stressed that this conclusion followed logically from its observation in *DeStefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308 (1968) (per curiam), "that, although 'the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . we would not assert . . . that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" *Summerlin*, 124 S. Ct. at 2525, *quoting DeStefano*, 392 U.S. at 633-34 (internal quotation marks omitted). The Court reasoned that if "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Id.* at 2526. *Summerlin* thus did not extend *Ring* retroactively to cases on habeas review notwithstanding the Court's recognition that "the right to jury trial is fundamental to our system of criminal procedure." *Id.*

Although *Summerlin* does not directly control the outcome of this case, the close similarities between the two cases are compelling. As in *Summerlin*, there is no clear consensus over the comparative effects *Roberts* and *Crawford* might have on the accuracy of jury verdicts, *see Crawford*, 124 S. Ct. at 1377-78 (Rehnquist, C.J., concurring), much less any

evidence that *Roberts* "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach," *Summerlin*, 124 S. Ct. at 2525, *quoting Teague*, 489 U.S. at 312-13. Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly inaccurate," *id.* at 2526, or otherwise "unfair," *id.* at 2525, *quoting DeStefano*, 392 U.S. at 634. Even assuming *Crawford's* reinterpretation of the Confrontation Clause is in some sense "fundamental" and accuracy-enhancing, it does not follow that "the values implemented by [that] right . . . would . . . measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right" as it is currently understood. *Summerlin*, 124 S. Ct. at 2525-26, *quoting DeStefano*, 392 U.S. at 634. There is simply no solid evidence that *Roberts* has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority.

Judge McKeown, however, concludes that *Crawford* is retroactive, because "the evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal." *Ante* at 2003-04. In her view, "*Crawford* itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Ante* at 2003, *quoting Summerlin*, 124 S. Ct. at 2525. But that is the wrong question. Prior to *Crawford*, courts may not have been required to exclude an unavailable witness's out-of court testimonial statement that was not was subject to cross-examination, but they were required to exclude statements that did not have "adequate indicia of reliability." *Roberts*, 448 U.S. at 66. Thus, the question is

not whether testimony that has been subject to cross-examination is more likely to be reliable than testimony that has not. Rather, the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is "one without which the likelihood of an accurate conviction is *seriously* diminished." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks omitted).

The Supreme Court's decision in *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) illustrates the principle that a new rule qualifies as a "watershed rule[] of criminal procedure," *Teague*, 489 U.S. at 311, only if it represents a substantial improvement over the previously existing rule. In *Sawyer*, the Court addressed the question whether a habeas petitioner could claim the benefit of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), which was decided after the petitioner's conviction became final and which "held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests else-where." *Sawyer*, 497 U.S. at 233. After concluding that *Caldwell* established a "new rule," *id.* at 233-41, the Court addressed whether *Caldwell* fit within either of *Teague*'s exceptions. But, in addressing whether *Caldwell* qualified as a "'watershed rule[] of criminal procedure,'" *id.* at 241, *quoting Saffle*, 494 U.S. at 495, the Court did not simply ask whether sentences imposed in violation of *Caldwell* were much less accurate than those imposed in compliance with *Caldwell*. Rather, the Court compared *Caldwell* against "the rule of [*Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974), which] was in place [at the time of the petitioner's trial and appeal] to protect any defendant who

could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair." *Sawyer*, 497 U.S. at 243. Although the Court's "concern in *Caldwell* was with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence," *Caldwell* had merely been "added to an existing guarantee of due process protection against fundamental unfairness." *Id.* at 244. Thus, the Court in *Sawyer* could not say that *Caldwell*'s "systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness,' of the type that may come within *Teague*'s second exception." *Id.*, *quoting Teague*, 489 U.S. at 314.

Here, too, *Crawford*'s new rule must be judged against the background in which it was decided, by comparing it to the rule of *Roberts*. Although certain language in Judge McKeown's opinion suggests that she purports to do so, *see Ante* at 2007 ("The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental."), she never actually asks the question upon which *Crawford*'s retroactivity turns: Does the admission of testimony which has been judicially determined to bear "adequate indicia of reliability" (as *Roberts* required), but which has not necessarily been subject to cross-examination (as *Crawford* requires), "so *seriously* diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach"? *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). As explained above, the answer to that question should not be in the affirmative.

Yet another flaw in Judge McKeown's analysis is her focus on language in *Crawford* suggesting that the new rule announced in that case is truer to the Framers' design. For example, she quotes the Court's statement that "the Framers

would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford*, 124 S. Ct. at 1373. *See Ante* at 2003. "The question here is not, however, whether the Framers believed that [cross-examination provides a] more accurate [means of testing the reliability of testimony] than [judicial determinations of 'reliability' pursuant to *Roberts*]," but "whether [the *Roberts* test] so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction.

The focus of Justice Scalia's analysis in *Crawford* was on *Roberts*' fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the *Roberts* regime. *See, e.g.*, *Crawford*, 124 S. Ct. at 1359 ("Petitioner argues that [the *Roberts*] test strays from the original meaning of the Confrontation Clause and urges us to reconsider it."); *id.* at 1369 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."); *id.* at 1370 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"). True, the Court stated that "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370; that "the legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception," *id.* at 1371; and even that "reliability is an amorphous, if not entirely subjective, concept." *Id.* But,

even if one assumes that the Framers were correct as an empirical matter that cross-examination is the best way to ensure the reliability of testimony, that does not mean that any other method impermissibly threatens punishing the innocent.

Finally, Judge McKeown's analysis is contrary to that of three other circuits that have held that *Crawford*'s rule does not fit within either of *Teague*'s exceptions. *See Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004). Although Judge McKeown criticizes *Brown* on the ground that "the Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure," *see Ante* at 2009, that attack is not well-founded. Our own decision in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) does not apply retroactively, employed the very reasoning that Judge McKeown finds objectionable. *See Sanchez-Cervantes*, 282 F.3d at 670 ("By applying harmless error analysis or plain error review to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule that 'implicate[s] the fundamental fairness of the trial'" (quoting *Teague*, 489 U.S. at 312) (footnote omitted)). The Tenth Circuit's reasoning in *Brown* is entirely consistent with our own in *Sanchez-Cervantes*, and provides yet another reason why Judge McKeown's analysis is unpersuasive.

For the foregoing reasons, I conclude that *Crawford* does not qualify as a "watershed rule[] of criminal procedure" appropriate for retroactive application to convictions already

final on direct review. *Teague*, 489 U.S. at 311. Like the Second Circuit in *Mungo*, *see* 393 F.3d at 334-35, and unlike Judge McKeown, *see* Ante at 2010-11, I therefore would not reach the question whether AEDPA "nullifies" the *Teague* exceptions, such that no "new rule"--even one fitting within one of those exceptions--may serve as the basis for habeas relief.

Nonetheless, to determine whether I can concur in the result, I must evaluate Bockting's Confrontation Clause claim according to the standards articulated in *Roberts* and our own pre-*Crawford* decisions.

B.

Because Judge McKeown's opinion does not get to the application of pre-*Crawford* law to Bockting's Confrontation Clause claim, it was not necessary for her to go into detail regarding the facts of this case that are relevant to such analysis, therefore I add them here.

At Bockting's March 30, 1988, preliminary hearing, Laura described Autumn's abuse allegations and other events leading up to Bockting's arrest. Prosecutors then called Autumn to the stand. Autumn testified that she knew the difference between the truth and a lie and answered preliminary questions about the alleged assault and subsequent rape examination. As the prosecutor probed more deeply into the details of Bockting's alleged assault, Autumn began to cry and averred that she could not remember basic facts such as what occurred in the bathroom with her father and whether she discussed her father's alleged assault with Detective Zinovitch. The judge asked Laura to take a seat next to Autumn on the witness stand, and Laura encouraged Autumn to "be honest" and "tell the truth." Responding that "you

already told them," Autumn refused to answer any further questions. The judge declared Autumn unavailable as a witness.

Bockting's jury trial commenced on August 15, 1988. The government, represented by Deputy District Attorney John Lukens, called Autumn as its first witness. The trial transcript reads as follows:

> The Court: Very good then. Mr. Lukens, your first witness.
>
> Mr. Lukens: Autumn Bockting.
>
> ***
>
> The Court: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State[;] the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.
>
> All right. Go ahead, counsel.
>
> Mr. Lukens: Autumn, this is when you have to stand up to be sworn.
>
> The Court: Can you stand up, Autumn? Can you stand up and raise your hand for me? Autumn, stand up now and raise your hand for us, okay.
>
> Mr. Lukens: Your Honor, I think under these conditions, I think that the witness is unable to testify.

The Court: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

Mr. Lukens: Your Honor, at this time since the Court has observed for itself the inability of Autumn Bockting to testify due to the emotional conflict that goes on within her, the State intends pursuant to [Nevada Revised Statute] 51.385 to offer into evidence the statements made by Autumn Bockting to both her mother, Laura, and Detective Zinovitch and, to a more limited extent, Diane Donovan.

This offer is made pursuant to [Nevada Revised Statute] 51.385 which states in pertinent part that, "In addition to any other provision for admissibility, a statement made by a child under the age of 10 years, describing any act of sexual conduct performed with or on the child, is admissible in a criminal proceeding regarding that sexual conduct if, A, the Court finds in hearing outside the presence of the jury that the time, content and circumstances of the statement provides sufficient circumstantial guarantees of trustworthiness, and, B, the child testifies at the proceeding or is unavailable or unable to testify." I submit that portion B has been met.

And, in addition, under [the provision formerly designated] Subsection [2], it says, "If the child is unavailable or unable to testify, written notice must be

> given to the defendant 10 days before the trial if the prosecution intends to offer the statements in evidence."
>
> I would submit that the State has complied with that and that such notice was filed on August 2nd, 1988 and is styled Notice Pursuant to [Nevada Revised Statute] 51.385 wherein I gave notice of the three individuals who I intend to call as to Autumn's statements.
>
> The Court: Very well. . . .

After hearing testimony from Laura and Detective Zinovitch outside the presence of the jury, the judge concluded that Autumn's hearsay statements were admissible under Nevada Revised Statutes 51.385 because Autumn was effectively unavailable for questioning:

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of a setting. . . . The little girl is obviously unavailable. And as far as these two statements, I am meaning the one to the mother and the one to Detective Zinovitch, I think they are allowed--they are credible enough to be allowed to be related to the jury.

Roberts outlines two preconditions for the introduction of out-of-court statements against a criminal defendant. First, the

government must establish the declarant's "unavailability" to testify as a witness at trial. *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000), *citing Roberts*, 448 U.S. at 65-66. Second, the government must demonstrate that the hearsay statements bear "adequate indicia of reliability" by showing that they either fall "within a firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 65-66. In Bockting's state proceedings, the Nevada Supreme Court determined that the government satisfied these two requirements, *see Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1366-70 (Nev. 1993) (per curiam), and Bockting challenges these determinations on federal habeas review. Mindful of a federal court's duty to defer to the state supreme court's factual determinations and reasonable applications of Supreme Court precedent, 28 U.S.C. § 2254(d)(1)-(2), I consider each *Roberts* requirement in turn.

1.

Bockting first asserts that the Nevada Supreme Court's decision is not entitled to deference under AEDPA because the court failed to review whether Autumn was available to testify at trial. The record does not support this characterization of the state supreme court's findings. When Autumn refused to cooperate as a trial witness, the prosecution moved to introduce her hearsay statements through the testimony of her mother, Detective Zinovitch, and Doctor Donovan pursuant to Nevada Revised Statute 51.385, which provides for the introduction of a child's hearsay statements if they are "unavailable or unable to testify." NEV. REV. STAT. 51.385. Before granting the prosecution's motion, the trial court made a clear, particularized finding that Autumn's refusal to cooperate on the stand had rendered her "obviously unavailable." The Nevada Supreme Court,

while observing that Nevada Revised Statute 51.385 "does not require the unavailability of a hearsay declarant as a prerequisite to the admissibility of the declarant's statements," nonetheless explicitly affirmed the trial court's determination "that the child was unavailable as a witness." *Bockting*, 847 P.2d at 1366 n.4; *see also* NEV. REV. STAT. 51.385 (allowing the introduction of hearsay statements when "the child testifies at the proceeding" in addition to when the child "is unavailable or unable to testify"). I would therefore reject Bockting's argument that the state supreme court's unavailability determination is not entitled to deference because the trial court failed to ascertain whether Autumn was available to testify at trial.

A more difficult question is whether the Nevada Supreme Court's substantive unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In past decisions, the Supreme Court has not found it necessary to decide whether a child witness is "unavailable" for Confrontation Clause purposes when the child is merely emotionally or developmentally incapable of testifying in that forum. *See Idaho v. Wright*, 497 U.S. 805, 815-16, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). As a general matter, however, the Court held in *Roberts* that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a *good-faith effort* to obtain [her] presence at trial." *Roberts*, 448 U.S. at 75, *quoting Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (emphasis added).

Seizing on *Roberts*'s good faith requirement, Bockting makes a plausible argument that child witnesses who refuse to testify in a courtroom setting should not be considered

"unavailable" unless the government first makes a good-faith attempt to secure their testimony through closed circuit television or some other medium amenable to cross-examination. I need not consider the merits of Bockting's proposal, however, because my task here is not to decide what might be best; instead, my review is limited to whether the Nevada Supreme Court's application of *Roberts* was *unreasonable*. *See* 28 U.S.C. § 2254(d). On its face, *Roberts* requires no more than "a good-faith effort to obtain [a witness's] presence at trial," *Roberts*, 448 U.S. at 75 (emphasis removed), *quoting Barber*, 390 U.S. at 724-25, and the government arguably satisfied this requirement here by (1) securing Autumn's physical "presence" at trial and (2) making "a good-faith effort" to elicit her testimony in that forum.

The Supreme Court's more recent decisions dealing with alternative procedures for obtaining trial testimony do not materially advance Bockting's habeas petition. Although the Supreme Court has permitted states to substitute one-way closed circuit television for in-court child testimony under certain circumstances, *see Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), it has never intimated that the Constitution *requires* the government to attempt such alternative procedures as a precondition for an unavailability finding. *Cf. Wright*, 497 U.S. at 818 ("Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial."). To the contrary, the Court has emphaticaliy rejected the assertion that *Craig*, 497 U.S. at 855, and *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), require the government to demonstrate "necessity" before introducing pretrial hearsay statements. *See White v. Illinois*,

502 U.S. 346, 358, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) ("There is . . . no basis for importing the 'necessity requirement' announced in [*Craig* and *Coy*] into the much different context of out-of-court declarations . . . ."). I would hold, therefore, that the Nevada Supreme Court's failure to insist upon alternative procedures for procuring Autumn's contemporaneous testimony did not involve an unreasonable application of *Roberts*, *Craig*, or *Coy*.

Setting aside Bockting's assertions of legal error, I must decide whether the Nevada Supreme Court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (holding that subsection 2254(d)(2) "applies . . . to situations where petitioner challenges the state court's findings based entirely on the state record"). Under this deferential standard of review, I may not "determine that the state-court factfinding process is defective in some way" unless I am "satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor*, 366 F.3d at 1000.

The record does not support Bockting's claim that the Nevada Supreme Court's reliance on the trial court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Gill v. Ayers*, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (explaining that when a state supreme court summarily adopts a lower court's finding of fact "we look through the unexplained . . . decision to the last reasoned decision . . . as the basis for the state court's judgment" (internal quotation marks, brackets, and citation omitted)). At Bockting's

preliminary hearing, Autumn initially responded to the prosecution's inquiries with incomplete or evasive answers, then quickly broke into tears and refused to answer any further questions. Efforts to elicit her testimony at trial were even less fruitful, as she refused so much as to stand or to raise her hand to be sworn in as a witness. The trial transcript does not paint a detailed portrait of Autumn's demeanor on the latter occasion, but there are strong hints that Autumn was distraught and uncommunicative from the start, leading the state trial court to conclude that there was no use pursuing further questioning before the jury. I therefore am not "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude" that Autumn was emotionally incapable of testifying at trial. *Taylor*, 366 F.3d at 1000. To the contrary, deference to state courts is particularly appropriate in a case such as this, where findings of fact turn on a trial court's eye-witness evaluation of a child witness's demeanor. *Cf. Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) ("Determinations of demeanor . . . . [are] entitled to deference even on direct review; 'the respect paid such findings in a habeas proceeding should be no less.'" (quoting *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984))). As Bockting did not present any evidence in federal district court to challenge the state trial court's findings, I presume that the trial court's findings are correct. *See* 28 U.S.C. § 2254(e)(1); *Taylor*, 366 F.3d at 1000 ("Once the state court's fact-finding satisfies this intrinsic review [on the record,] . . . the state court's findings are dressed in a presumption of correctness . . . .").

In sum, Bockting has not established that the Nevada Supreme Court's unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

2.

Turning to *Roberts*'s "adequate indicia of reliability" requirement, the Nevada Supreme Court acknowledged that Autumn's hearsay statements did not fit within any "firmly rooted hearsay exception" but held that her statements bore the requisite "particularized guarantees of trustworthiness" for admission under *Roberts*. *Bockting*, 847 P.2d at 1367-70. Applying the multifactor test outlined in *Wright*, 497 U.S. at 821-22, the court identified several circumstances which, in its view, buttressed the "trustworthiness" of Autumn's abuse allegations, including: (1) the "spontaneity and consistent repetition" of her statements, (2) the "agitation and fear" before first recounting the experience to her mother as evinced by "the fact that she was visibly shaken and crying," (3) her apparent "knowledge of sexual conduct not present in most children six years of age," (4) her "child-like terminology" which "was reflective of candor rather than coaching," and (5) her "display of affection for Bockting . . . indicative of love rather than hate." *Bockting*, 847 P.2d at 1369.

Bockting argues that the Nevada Supreme Court evaluated the trustworthiness of Autumn's statements based on an unreasonable application of Supreme Court precedent, because it mistakenly interpreted *Wright* to prohibit consideration of any evidence that did not support trustworthiness. *Wright* held that in evaluating whether a declarant's statement bears "'particularized guarantees of trustworthiness[,]' . . . relevant circumstances include only

those that surround the *making* of the statement," not evidence corroborating the *substance* of a declarant's hearsay statements (e.g., physical evidence of sexual abuse). *Wright*, 497 U.S. at 819 (emphasis added). Although *Wright* did not decide whether courts may consider noncorroborating evidence that refutes the substance of a declarant's statements (e.g., physical evidence contradicting an accuser's abuse allegations), *see Swan v. Peterson*, 6 F.3d 1373, 1381 (9th Cir. 1993) --an issue not before us here--the Court's reasoning strongly suggests that courts must at least consider any circumstances surrounding the making of an out-of-court statement that challenge the statement's trust-worthiness (e.g., inconsistencies, motives to fabricate). *See Wright*, 497 U.S. at 825-27; *Webb v. Lewis*, 44 F.3d 1387, 1392 (9th Cir. 1994) (holding that *Wright* "does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay"); *Swan*, 6 F.3d at 1381 n.7 (reasoning in dicta that "because *Wright* holds that the consistency of a child witness's allegations bears on the reliability of an initial hearsay statement, arguably a later *inconsistent* statement should also be evaluated in making the reliability determination").

I need not decide, however, if a categorical refusal to consider evidence challenging the trustworthiness of Autumn's out-of-court statements would constitute an objectively unreasonable application of *Wright*, for the record does not support Bockting's assertion that the Nevada Supreme Court "explicitly refused to consider evidence" establishing the unreliability of Autumn's accusations in this case. Footnote 8 of the state supreme court's opinion characterizes *Wright* as excluding "corroborative evidence . . . in determining the reliability of hearsay statements" and hypothesizes that *Wright* might require courts "to exclude evidence of marital discord on the part of the parents as a

possible motive in the mother for having the child fabricate charges of sexual abuse against the husband." *Bockting*, 847 P.2d at 1369 n.8. Although these statements suggest the court might have mis*interpreted Wright* to some degree, they do not clearly establish that the court mis*applied Wright* in this case by refusing to consider critical, admissible evidence such as the marital discord between Bockting and Laura. In the body of its opinion, the court stated it reached its trustworthiness determination based on "*the totality of the circumstances* surrounding the child's out-of-court statements" and asserted that "neither the [five] factors [listed above] *nor any other aspect of the record evidence* provides insights into a motive for dissembling on the part of the child." *Id.* at 1369-70 (emphasis added). True, the court did not expressly discuss the Bocktings' marital discord and certain other evidence damaging to the trustworthiness of Autumn's statements, but it did refer to Laura's testimony that Autumn "had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults." *Id.* at 1369 n.7. Given the Nevada Supreme Court's assertion that it considered all the "record evidence" in assessing Bockting's claims, it would appear that its "totality of the circumstances" analysis did, in fact, embrace the Bocktings' marital problems and other relevant circumstances surrounding Autumn's out-of-court statements. I would thus reject Bockting's contention that the Nevada Supreme Court unreasonably applied *Wright*'s restrictions on corroborating evidence.

The ultimate determination "whether [Autumn's] hearsay statements were sufficiently reliable to be admitted without violating [*Roberts*] is a mixed question" of law and fact, *Swan*, 6 F.3d at 1379, so I review the Nevada Supreme Court's reliability determination to ascertain whether it "was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003) (stating that subsection 2254(d)(1) applies "to mixed questions of law and fact" (citing *Williams v. Taylor*, 529 U.S. 362, 407-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2001)). To the extent the Nevada Supreme Court's "particularized guarantees of trustworthiness" rest on findings of fact, I must decide whether the determination "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Bockting argues that neither the spontaneity and emotional intensity of Autumn's allegations nor her apparent lack of motive to fabricate are indicative of truthfulness, because they can easily be explained away by one of two alternative theories. First, he observes that Autumn delivered her original abuse account shortly after arising from sleep and contends that she could have been recounting a fantastical nightmare. This "nightmare" theory is entirely speculative and appears implausible given the graphic specificity of Autumn's allegations. Second, Bockting posits that Laura might have fabricated the abuse allegations herself and coached Autumn through the police interviews. Like the "nightmare" theory, this "coaching" theory is utterly unsubstantiated by the record, and it fails to account for Autumn's spontaneous use of dolls to describe the assault during her interview with Zinovitch and the child-like terminology Autumn used to describe her abuse. *See Bockting*, 847 P.2d at 1368. Because Bockting's speculation and conjecture do not establish that the Nevada Supreme Court's factual findings were "unreasonable" with respect to Autumn's spontaneity, mental state, and motive, 28 U.S.C. § 2254(d)(2), I presume these

findings are correct, *id.* § 2254(e)(1). *See Taylor*, 366 F.3d at 1000.

Somewhat more compelling is Bockting's challenge to the Nevada Supreme Court's reliance on Autumn's "knowledge of sexual acts that a child of six would not usually be aware of absent personal experience." *Bockting*, 847 P.2d at 1369. Laura conceded at trial that Autumn had seen adult sexual organs, had showered with each of her parents, had watched her mother practice exotic dancing, and had observed her parents engaging in sexual intercourse after entering the bedroom unnoticed. Bockting elaborated on Laura's testimony, alleging that Autumn had witnessed her parents engage in oral sex and was herself "interested" in sex. For these reasons alone, the state supreme court had reason to suspect that Autumn's familiarity with adult sexual acts would exceed that of the average six-year-old. On the other hand, the state supreme court concluded that the testimony of Autumn's parents did not adequately account for Autumn's ability to "demonstrate[] through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child" and to describe "how she held onto the [bathroom] sink while Bockting was behind her and 'would press real hard and it hurt.'" *Id.* The substance of Autumn's allegations disclosed knowledge of sexual acts gained from direct personal experience, not remote observation. Thus, it was not unreasonable for the state supreme court to find, as it did, that Autumn's prior exposure to adult sexual acts did not adequately explain her familiarity with the specific acts described in her abuse allegations.

Arguably the weakest link in the Nevada Supreme Court's "particularized guarantees of trustworthiness" determination is its finding that "sufficient . . . consistent repetition existed

in [Autumn's] various statements." *Id.* Autumn's abuse allegations to her mother and Detective Zinovitch were substantially identical, so it was not unreasonable for the state supreme court to conclude that Autumn's "restatement of her travails [to Detective Zinovitch] was consistent with the details she had previously told to her mother." *Id.* at 1368. On the other hand, the court did not mention that Autumn's out-of-court statements contradicted her testimony at the preliminary hearing in several material respects. The Nevada Supreme Court's inattention to these inconsistencies in Autumn's statements is potentially significant under AEDPA; as the Supreme Court has observed and we have held, section 2254(d)(2) allows habeas relief "where the state has before it, yet apparently ignores, evidence that supports [a] petitioner's claim." *Taylor*, 366 F.3d at 1001 (paraphrasing *Miller-El v. Cockrell*, 537 U.S. 322, 346, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

Although the Nevada Supreme Court did not expressly discuss Autumn's statements at the preliminary hearing when evaluating the consistency of her out-of-court statements, it did not ignore these statements altogether. The court clearly recognized the inconsistencies in Autumn's statements, because the "Facts" section summarized Autumn's relevant testimony at the preliminary hearing. *See Bockting*, 847 P.2d at 1365 ("At the preliminary hearing, ... [Autumn] stated that her pants were never removed [during the alleged abuse] and that she could not remember how Bockting touched her."). Thus, this testimony was an "aspect of the record evidence" that the state supreme court incorporated into its evaluation of the "totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*." *Id.* at 1369-70. As such, I would reject Bockting's assertion that the state supreme court "failed to consider and weigh relevant

evidence that was properly presented." *Taylor*, 366 F.3d at 1001.

Moreover, Autumn's testimony at the preliminary hearing does not compel the conclusion that the Nevada Supreme Court's reliability analysis runs "contrary to, or involve[s] an unreasonable application of," *Roberts* or *Wright*. 28 U.S.C. § 2254(d)(1). As we recently explained, "the Supreme Court has specifically 'declined to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under [*Roberts*],'" and "'courts have considerable leeway in their consideration of appropriate factors.'" *Parle v. Runnels*, 387 F.3d 1030, 1039 (9th Cir. 2004), *quoting Wright*, 497 U.S. at 822. In this case, the state supreme court had good reason to focus on the consistency of Autumn's statements to her mother and Detective Zinovitch and discount the reliability of her in-court statements as factors in its reliability analysis. Autumn's testimony at the preliminary hearing was patently evasive, perhaps reflecting her emotional state, her desire to minimize harm to her stepfather, and her embarrassment at being asked to discuss the assault's graphic details in an open public forum. Doctor Donovan's expert testimony also indicated that Autumn's equivocation at the preliminary hearing was consistent with the denial phase child abuse victims commonly endure after a sexual assault. Considering the totality of the circumstances surrounding Autumn's hearsay statements, *see id.* at 820, I am not persuaded that the Nevada Supreme Court applied *Roberts* and *Wright* unreasonably by holding that Autumn's testimony at the preliminary hearing does not singlehandedly tip the scale of reliability against the admission of her out-of-court statements.

Since the Nevada Supreme Court's "unavailability" and "adequate indicia of reliability" determinations satisfy

AEDPA's stringent standard of review, Bockting's Confrontation Clause claim fails.

II.

In addition to his Confrontation Clause claim, Bockting raises several other claims in support of his habeas petition. Although neither Judge McKeown nor Judge Noonan discuss these issues, I explain why these arguments should not require reversal.

A.

Bockting contends that the state trial court violated his right to due process by admitting witness testimony regarding a prior accusation of sexual misconduct. Bockting takes issue with the following exchange between Deputy District Attorney Lukens and Laura, which took place during the state's rebuttal to defense character evidence:

> Q: Without going into the details underlying this, I am going to ask you the following question. Between July of 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and Autumn?
>
> A: Yes.
>
> Q: What was his response at the time?
>
> A: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what she said.

Bockting did not object to these questions or request a limiting instruction, and the state trial court did not give such an instruction.

During his "post conviction relief" hearing, Bockting argued that Laura's testimony impermissibly allowed the jury to consider past allegations of sexual assault as evidence that he committed the subsequent sexual assault for which he was convicted. The state trial court and supreme court upheld the evidence's admission, holding that the trial court's decision was consistent with state evidence law. *See* NEV. REV. STAT. 48.045(1) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [as] offered by an accused, and similar evidence offered by the prosecution to rebut such evidence . . . ."); *id.* 48.055. ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of opinion. On cross-examination, inquiry may be made into specific instances of conduct.").

I do not consider at this stage whether the Nevada Supreme Court misinterpreted Nevada law by refusing to grant post-conviction relief based on the trial court's decision to admit Laura's testimony without providing a limiting instruction sua sponte. "Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." *Whelchel v. Washington*, 232 F.3d 1197, 1211 (9th Cir. 2000) (internal quotation marks and citation omitted). Thus, my task is limited to deciding whether the evidence's admission violated Bockting's clearly established *federal* rights as defined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

The Supreme Court has never decided whether due process prohibits the admission of prior bad acts evidence, *see Estelle v. McGuire*, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (declining to decide whether due process prohibits prior bad acts evidence to show propensity to commit a crime); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003), *cert. denied*, 540 U.S. 930, 124 S. Ct. 345, 157 L. Ed. 2d 236 (2003) (mem.) ("There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence."), but it has said that defendants who challenge a state court's admission of relevant evidence on due process grounds "must sustain the usual heavy burden that a due process claim entails: . . . 'it [must] offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality), *quoting Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal footnote omitted).

In this case, the admission of Laura's unobjected-to testimony did not meet this "heavy burden" for a valid due process claim. The trial court admitted Laura's testimony during the state's rebuttal case as a response to the testimony of three defense witnesses who testified concerning Bockting's alleged good reputation and character. Laura's rebuttal testimony was relevant to impeach the defense's reputation evidence. The prosecutor touched on Laura's previous allegations only briefly, deliberately skirted the allegations' underlying details to minimize prejudice, and fully disclosed Bockting's vehement denial of the allegations. Moreover, the testimony arguably advanced Bockting's defense by introducing his emotional denial of the previous allegations, as well as Laura's concession that she "didn't believe" the

allegations. Given that this evidence came in response to defense character evidence and taking into account the lack of objection, the brevity, and limited scope of the government's questioning relating to Laura's previous confrontation with Bockting, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of this evidence did not transgress a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (internal quotation marks omitted).

B.

Bockting asserts that the government violated his due process right to a fair trial by vouching for Laura's credibility during closing argument. *See United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) ("Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony."). As examples of vouching, Bockting cites the prosecutor's statements that Laura "testified as candidly as I think is possible" and "had one motive and it was to tell you the truth." He also faults the prosecutor for characterizing Laura's testimony as "unembellished, . . . straightforward, and . . . candid."

Even if these statements arguably constituted "vouching," Bockting does not qualify for habeas relief under AEDPA's deferential standard if the Nevada Supreme Court's failure to grant post-conviction relief on this basis was neither "contrary to," nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). According to the Supreme Court, "the relevant question" in evaluating a prosecutorial vouching claim "is whether the prosecutors'

comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Several factors work to Bockting's disadvantage here. First, the prosecutor did not ask the jury to accept Laura's credibility based on his endorsement alone; rather, he explained that "the *evidence* shows that [Laura] was candid" (emphasis added), and he identified several specific instances where Laura made no attempt to conceal facts damaging to Autumn's allegations (e.g., Autumn observing her parents engaged in sexual relations) or to her own reputation and credibility as a government witness (e.g., her drug and alcohol problems, her occupation as a nude dancer). *See Necoechea*, 986 F.2d at 1276 (recognizing "that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying"). Second, the trial court significantly diminished the risk of prejudice by instructing the jury that "statements, arguments and opinions of counsel are not evidence in the case." As in *Davis v. Woodford*, 333 F.3d 982 (9th Cir. 2003), "this was not a case in which there was an 'overwhelming probability that the jury [would] be unable to follow the court's instructions' and 'a strong likelihood that the effect of the [vouching] would be devastating to the defendant,'" *id.* at 997 (second alteration in original), *quoting Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). Third and perhaps most important, the prosecutor's statements did not render the trial fundamentally unfair because the record confirmed Laura's testimony, including: testimony by Doctor Rivers (who conducted Autumn's rape examination) that Autumn had suffered penetration injuries to her vagina and rectum during the previous week, Bockting's

admission that he was the only adult male who was alone with Autumn during the week when she sustained her injuries, and Detective Zinovitch's testimony substantially corroborating Laura's description of Bockting's sexual assault. In sum, under the circumstances of this case, Bockting has not demonstrated that the Nevada Supreme Court applied the principle in *Darden* unreasonably by holding that the prosecutor's vouching did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Davis*, 333 F.3d at 996-97, *quoting Darden*, 477 U.S. at 181.

C.

Lastly, I consider Bockting's assertion that his representation at trial was constitutionally deficient. The Supreme Court has held that a claimant "must show that counsel's performance was deficient" and that such "performance prejudiced the defense" to prevail on a Sixth Amendment ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a claimant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The question to be answered is whether the Nevada Supreme Court's denial of post-conviction relief was "contrary to, or involved an unreasonable application of," these principles. 28 U.S.C. § 2254(d)(1).

I confine my ineffective assistance analysis to the three issues addressed in our October 16, 2002 order granting Bockting's first motion to broaden the Certificate of

Appealability (COA): (1) trial counsel's failure to object to inadmissible hearsay evidence at trial, (2) trial counsel's failure to object to repeated instances of prosecutorial vouching, and (3) appellate counsel's failure to research adequately and present these appealable issues to the Nevada Supreme Court. Bockting's second motion to broaden the COA, which is currently before this court, raises a fourth ineffective assistance of counsel issue: his "trial counsel's failure to conduct any investigation of the facts which would undermine the reliability of the child's hearsay statements." The second motion for broader certification was filed on June 17, 2003--more than a year after the district court declined to certify Bockting's ineffective assistance of counsel claim and eight months after we granted his first motion to broaden the COA. Pursuant to Circuit Rule 22-1(d), Bockting should have raised any and all grievances relating to the COA's scope "within thirty-five days of the district court's entry of its order denying[, in part, his] certificate of appealability." 9TH CIR. R. 22-1(d). His "failure to comply with the Circuit Rule's procedure is a ground for denying" the second motion, "which [I would] do here." *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003).

With respect to the remaining Sixth Amendment claims, the Nevada Supreme Court invoked *Strickland*'s standard and held that Bockting "has not demonstrated that counsel's performance was unreasonable, or that counsel's errors were so severe that they rendered the jury's verdict unreliable." I need not consider the first part of this holding, because the record as a whole does not support Bockting's claim that the state supreme court unreasonably applied *Strickland*'s prejudice inquiry. *Cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1053 (9th Cir. 2004) (observing that "in making a harmless error determination in a habeas case," federal courts have "an obligation" to consult the full record), *quoting O'Neal v.*

McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).

Bockting faults his trial counsel for failing to object to the government's prior bad acts evidence, but he has not demonstrated that he suffered any prejudice from his counsel's allegedly deficient performance. A timely objection by Bockting's counsel likely would have been futile, because Laura's testimony was admissible under state law. In addition, even setting aside Laura's testimony concerning Bockting's prior bad acts evidence, the evidence against Bockting was overwhelming. Similar logic dooms Bockting's other arguments. His trial counsel's failure to register a timely objection to the prosecutorial vouching did not clearly prejudice his defense, because the trial court gave a cautionary instruction and there was overwhelming evidence corroborating Laura's testimony.

In sum, Bockting has not shown that the Nevada Supreme Court applied *Strickland* unreasonably to the facts of this case by holding that his "counsel's errors were [not] so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. I would therefore hold that we lack authority under AEDPA to grant Bockting's petition for habeas relief on this ineffective assistance of counsel claim.

For the foregoing reasons, I would affirm the district court's denial of Bockting's petition for habeas corpus. I therefore respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-15866
D.C. No. CV-98-00764-ECR
District of Nevada, Reno

[Filed April 1, 2004]

MARVIN HOWARD BOCKTING, Petitioner - Appellant,	)
v.	)
ROBERT BAYER, Respondent - Appellee.	)

Before: WALLACE, NOONAN, and McKEOWN, Circuit Judges.

ORDER

The parties are directed to file, within twenty-eight (28) days from the date of this order, simultaneous briefs of no more than twenty (20) pages responding to the following questions:

(1) Should this court apply *Crawford*'s new-constitutional rule retroactively to *Bockting*'s collateral proceedings? *See Crawford v. Washington*, 2004 WL 413301 at *13.

(2) Which, if any, of the hearsay accusations admitted at trial are admissible under *Crawford*?

(3) Assuming a Confrontation Clause violation occurred, should this court consider the error harmless and affirm the denial of petition?

(4) Should the petition be remanded to state court for reconsideration in light of *Crawford*?

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-98-0764-ECR (VPC)

[Filed March 19, 2002]

MARVIN HOWARD BOCKTING, Petitioner,	)
v.	)
ROBERT BAYER, *et al.*, Respondents.	)

ORDER

Petitioner Marvin Howard Bockting ("Bockting") filed a second amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his sentence and conviction (Docket #35). Respondents filed a motion to dismiss the petition under *Rose v. Lundy,* 455 U.S. 509 (1982), arguing that several claims forwarded in the petition were unexhausted (Docket #37). This court previously determined that Bockting has failed to exhaust state court remedies with regard to two of his constitutional ineffective assistance of counsel claims: (1) trial counsel was ineffective in his performance at an evidentiary hearing held to determine the admissibility of the

child victim's statements and (2) trial counsel failed to adequately cross examine or impeach the direct testimony of prosecution witnesses (Docket #47).

In response, Bockting filed a declaration abandoning these claims. Thus, pending before the court at this time are the remaining claims in the petition. These include a claim based on the Confrontation Clause, several claims based on the Due Process Clause, and three claims based on petitioner's Sixth Amendment right to effective assistance of counsel. The court has reviewed the entire record in this case, including all exhibits of the state proceedings, as well as all of the pleadings, motions and other documents filed in the record of this case. Following that review, the court concludes that the Bockting is not entitled to relief pursuant to 28 U.S.C. § 2254, and that his petition for writ of habeas corpus shall be denied.

A. Facts of Case

In January of 1988, Bockting was living in a Las Vegas motel with his wife Laura Bockting ("Laura"), Laura's six year old daughter, and Bockting and Laura's three year old daughter. On January 11, Laura started taking evening classes at a local business college. Bockting watched the two children while she was gone. According to Laura's testimony, the six year old daughter came to her on the night of January 16 and related to her details of sexual abuse by Bockting that she (the daughter) had endured one evening while Laura was away at class. Laura testified as to the various sexual acts her daughter had told her Bockting had committed during this episode.

On January 19, Laura took her daughter to the hospital where Detective Zinovitch with the Sexual Assault Unit of the Las Vegas Metropolitan Police Department unsuccessfully

attempted to interview the child. The detective then ordered that the child be medically examined. He also arranged with Laura to interview the child a couple of days later. Doctor Rivers, a gynecologist, testified at trial that her examination of the child revealed injuries to the rectum and vagina that were consistent with "blunt force" having been applied to those areas. At least with regard to the rectal injury, Doctor Rivers concluded that it had occurred within a week prior to the examination. When asked at trial whether any other males had been around the child in the week prior to the examination, Bockting answered that "when [he] was around, no one."

On January 21, Detective Zinovitch interviewed the child. The child described to the detective sexual acts very similar, if not identical, to those which she had related to Laura. He testified that the child's descriptions of these events were credible, that she used age appropriate terminology as opposed to terms normally used by adults, and that she accurately re-enacted the events using anatomically correct dolls.

At Bockting's preliminary hearing, the child became very upset during questioning and her testimony was terminated before the defense had an opportunity to cross examine her. Bockting was, nonetheless, held to answer based on the testimony of Laura Bockting and Detective Zinovitch. On August 15, 1988, Bockting's trial commenced in the Eighth Judicial District Court. Upon being called to testify at trial, the child became distraught and the court ruled that she was again unavailable as a witness. The prosecution then moved for her hearsay statements (to Laura and Detective Zinovitch) to be admissible under NRS 51.385. After an evidentiary hearing, the trial court ruled in the prosecution's favor, but

also ordered that the defense would be able to present the child's preliminary hearing testimony to the Jury.

On August 18, 1988, after a three day trial, a Jury found Bockting guilty of three counts of sexual assault on a minor under the age of 14 years. On September 21, 1988, he was sentenced to life imprisonment (two consecutive terms and the third concurrent with the second) with the possibility of parole on each count. Bockting appealed the judgment of conviction to the Nevada Supreme Court. On June 22, 1989, the Supreme Court entered an order dismissing appeal deciding that all of Bockting's contentions on appeal lacked merit.

Bockting then applied to the United States Supreme Court for a writ of certiorari. On July 5, 1989, the Nevada Supreme Court stayed the issuance of the remittitur pending the outcome of the application. On April 13, 1990, while his application to the United States Supreme Court was pending, Bockting filed a petition for post-conviction relief in the Eighth Judicial District Court.

On June 28, 1990, the United States Supreme Court issued an opinion which vacated the Nevada Supreme Court's order dismissing Bockting's appeal and remanded the matter to that Court for further consideration in light of *Idaho v. Wright*, 497 U.S. 805 (1990). The Nevada Supreme Court subsequently affirmed the petitioner's conviction on March 8, 1993, finding that the child's hearsay statements were admissible under the criteria set forth by the United States Supreme Court in *Wright*. On April 22, 1993, Bockting voluntarily dismissed his petition for post-conviction relief in the Eighth Judicial District Court, such petition having been held in abeyance while direct appeal proceedings were pending.

On March 30, 1994, Bockting filed another petition for post-conviction relief in the Eighth Judicial District Court. On July 6, 1994, the court held an evidentiary hearing despite the fact that Bockting was not present or represented at the hearing. On September 15, 1994, the court's order denying the petition was filed. Bockting appealed this order to the Nevada Supreme Court. On December 24, 1997, the Nevada Supreme Court filed its order dismissing appeal. Bockting's next step was to file a petition for a writ of habeas corpus in this court.

B. Legal Discussion

The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by Bockting and the respondents. Following that review, the court is fully apprized of the facts and circumstances regarding this matter, and finds that further briefing by the parties is neither warranted nor required. Further, the court finds that the factual record has been sufficiently developed in the state courts regarding issues presented in this petition. For any claim which Bockting contends that such factual development has not occurred, the court finds that Lord has not demonstrated that he can meet the requirements of 28 U.S.C. § 2254(e)(2). Thus, this court will not hold an evidentiary hearing in this matter.

After having examined each claim in detail, the court finds none of them sufficient to warrant the issuance of the writ.

1. Ground One

As Ground One, Bockting claims that his right to confront and cross examine a witness against him, as guaranteed by the

by Sixth Amendment, was violated when the trial court allowed the child victim's hearsay statements to be admitted at trial based on NRS 51.385.[1] Bockting argues, in apparent reference to 28 U.S.C. § 2254(d)(1), that the Nevada Supreme Court's ruling that the child's hearsay statements were reliable and, thus, admissible under the criteria set forth in *Idaho v. Wright* was an "unreasonable application" of clearly established federal law. In support of this argument, Bockting makes several factual allegations which he claims indicate that the child's statements did not have the "particularized guarantees of trustworthiness" required by *Wright*. 497 U.S. at 818-21.

The United States Supreme Court in *Wright* clarified the test for determining whether the admission at trial of hearsay statements made by an alleged child victim of sexual abuse will violate the Confrontation Clause. The Court held that the admission of such a statement will not run afoul of the Clause if the statement either (1) falls within a firmly rooted hearsay exception or (2) is supported by a showing of "particularized guarantees of trustworthiness." *Id.* If the statement does not meet the former requirement, there is a presumption of unreliability which the State must overcome by showing that statement meets the latter requirement based on "the totality of the circumstances" surrounding the making of the statement. *Id.* at 819. The circumstances that may be considered are only those "that surround the making of the statement and that render the declarant worthy of belief." *Id.* Other evidence presented at trial that might corroborate the

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[1] NRS 51.385 provides for, under specified circumstances, the admissibility in criminal proceedings of hearsay statements describing sexual conduct made by a child under the age of 10 years.

truth of the statement is not to be considered in this inquiry. *Id.* at 822. Finally, in announcing this two-part test, the Court in *Wright* declined to decide whether the child declarant's unavailability as a witness must be established before his or her out-of-court statements are admitted. *Id.* at 816.

Applying this test, the Nevada Supreme Court found that, while NRS 51.385 is not a codification of a "firmly rooted hearsay exception," the following facts nonetheless demonstrated the reliability of the child's statements:

> "(1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate."

Bockting v. State, 109 Nev. 103, 111 (1993). The Court also noted that the record was devoid of evidence of any motive the child might have to fabricate her statements. *Id.* Based on these factors, the Court concluded that the child's hearsay statements were properly admitted by the trial court under *Wright. Id.*

While not resoundingly convinced that the State overcame the presumption of unreliability attached to hearsay statements that do not fall within a firmly rooted hearsay exception, this

court must nonetheless deny Bockting's application for habeas relief based on the Confrontation Clause. As to the reliability of the child's hearsay statements, this court is mainly concerned with the fact that the child's abbreviated preliminary hearing testimony deviated from her previous description of events and, at no point, was the child subject to any form of cross examination or adverse questioning. Even so, the Nevada Supreme Court's decision on this issue was sufficiently consistent with federal law so as to preclude this court from granting habeas relief.

As to any habeas claim that was adjudicated on the merits by the state court, a federal court may grant relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362 (2000), the United States Supreme Court provided some clarity as to how to apply 28 U.S.C. § 2254(d)(1). It held that the "contrary to" and "unreasonable application" clauses have distinct meanings. *See Williams,* 529 U.S. at 404-10; *see also, Van Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir. 2000). Under the "contrary to" clause, a federal court should grant the writ (1) when the state court has failed to apply the correct controlling authority from the Supreme Court or (2) when the state court has applied the correct controlling authority from the Supreme Court to a case involving facts "materially indistinguishable" from those in a controlling case, but has nonetheless reached a different result. *Van Tran,* 212 F.3d at 1150 (citing *Williams,* 529 U.S. at 406).

Under the "unreasonable application" clause, a federal court should grant the writ when the state court's application of clearly established federal law is "objectively unreasonable." *See Williams,* 529 U.S. at 409. The Ninth

Circuit Court of Appeals has held that a decision is "objectively unreasonable" when it is clearly erroneous. *See Van Tran,* 212 F.3d at 1152-54. It is not enough that the court is convinced that the petitioner has the better of two reasonable legal arguments. Instead, the court must be left "with a 'firm convictlon' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred." *Id.* at 1153-54.

Here, the Nevada Supreme Court's decision was neither "contrary to," nor did it involve "an unreasonable application of," clearly established federal law. The Nevada Supreme Court applied the correct controlling authority from the United States Supreme Court *(Idaho v. Wright)* and, although it reached a different result, this case involved facts which were materially distinguishable from those in *Wright.* In *Wright,* the Court identified only two factors (lack of motive to "make up a story of this nature" and statement not type that one would a expect a child of the given age to fabricate) relevant to a showingof the "particularized guarantees of trustworthiness." 497 U.S. at 826. Looking to the "totality of the circumstances," the Court concluded that these factors did not outweigh the presumption of unreliability of out-of-court statements and the suggestive manner in which the examining pediatrician conducted the interview. *Id.* at 826-27.

In the present case, the Nevada Supreme Court identified the five factors noted above as relevant to a showing of the "particularized guarantees of trustworthiness." It also concluded that the record contained no indication of any motive the child might have to fabricate a story of sexual abuse. Thus the facts of Bockting's case are sufficiently distinguishable from those in *Wright* to prevent this court

from finding that the Nevada Supreme Court's decision was "contrary to" established federal law.

The Nevada Supreme Court's application of *Idaho v. Wright* was also not "objectively unreasonable." Despite the reservations mentioned above, this court is not left with a "firm conviction" that the application of federal law that the Nevada Supreme Court adopted was erroneous and that Bockting's position on this issue is the correct one. Other than the two points mentioned above – i.e., a deviation from prior accounts in the child's testimony at the preliminary hearing and the absence of *any* opportunity for cross examination or adverse questioning – Bockting's claims of unreliability are based largely on unsubstantiated allegations.[2] For example,

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[2] Bockting also makes a passing claim that the Nevada Supreme Court unreasonably applied federal law by failing to address the trial court's finding that the child victim was "unavailable" as a witness. This claim is without merit. The United States Supreme Court in *Wright* specifically noted that, for the purposes of that decision, the "requirement of unavailability" was not at issue. Thus, in complying with the U.S. Supreme Court's mandate to review its prior decision in light of *Wright*, the Nevada Supreme Court was not required to address the issue of the child victim's availability as a witness.

Nonetheless, the Nevada Supreme Court did, in fact, address this issue by noting that it was satisfied that the record supported a finding that the child was "unavailable" as a witness and that, in any case, the general trend among the state and federal courts was to find that the Confrontation Clause did not require a finding that the witness was unavailable before admitting his or her hearsay statements. *Bockting*, 109 Nev. at 106, n.4. Indeed, in *White v. Illinois*, 502 U.S. 346, 354 (1992), the Supreme Court noted that availability of the witness is relevant to a Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.

Bockting claims that Laura Bockting coerced her daughter into making accusations against him and that Detective Zinovitch's interview was tainted by suggestion and constant correction in eliciting responses from the child. However, the record contains little, if any, evidence to support either of these allegations. Thus, not only was the Nevada Supreme Court's decision not an unreasonable application of federal law, it was probably the correct result given the record before the Court.

2. Ground Two

As Ground Two, Bockting claims that his due process rights under the Fifth and Fourteenth Amendments were violated based on the trial court's admission of evidence of prior bad acts and based on several instances of alleged prosecutorial misconduct. As to the former basis, the court finds that the admission of evidence of prior bad acts was neither arbitrary nor more than minimally prejudicial. Thus, Bockting's due process rights were not violated as a result of the admission of any such evidence. Similarly, as to the latter basis, this court concludes that Bockting has failed to demonstrate that his constitutional due process rights were violated based on either a single instance of alleged prosecutorial misconduct or the cumulative effect of such instances.

a. Evidence of Prior Bad Acts

In cross examining one of Bockting's character witnesses at trial, the prosecution inquired, over a defense objection, as to whether Bockting had ever informed the witness of a prior instance of the child victim making an allegation of sexual misconduct against Bockting when the family lived in Colorado. The witness testified that Bockting had never

mentioned such an incident to her. Later in the trial, on rebuttal, the prosecution elicited testimony from Laura Bockting that, while living in Colorado, she had confronted Bockting with regard to an allegation of sexual misconduct, but that, at the time, she believed Bockting's denial of the allegation.[3]

The Eight Judicial District Court, in ruling upon Bockting's petition for post-conviction relief, determined that the cross examination of Bockting's witness regarding the prior bad act was permissible because the witness had been called to testify to Bockting's character. As to Laura Bockting's rebuttal testimony, the court concluded that, because the testimony regarding the prior bad act was very limited, it was non-prejudicial and within the trial court's discretion to admit.

This court need not engage in a detailed analysis of Nevada's evidentiary rules and the issue of whether the trial court may have erred in admitting the challenged testimony. A state court's evidentiary ruling is not subject to federal habeas review on due process grounds unless "the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walters v. Maass,* 45 F.3d 1355, 1357 (9th Cir. 1995). In Bockting's case, the admission of the evidence was not "arbitrary" in that it was arguably, if not actually, admissible under Nevada's evidence rules. *See* NRS 48.045 and 48.055.

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[3] Bockting also claims that the prosecutor made reference to this incident in his closing argument, but if so, the reference is so veiled as to be inconsequential.

The evidence was also not sufficiently prejudicial so as to render the trial fundamentally unfair. With regard to the cross examination of Bockting's character witness, the essence of the witness's testimony was that she had no knowledge of any such prior incident. As to any prejudicial effect that may have arisen from the prosecutor's line of questioning, the jury was specifically instructed to "not speculate to be true any insinuations suggested by a question asked a witness" and that "[a] question is not evidence and may be considered only as it supplies meaning to the answer." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31).

As for Laura Bockting's rebuttal testimony, the prior bad act evidence consisted entirely of the following exchange:

Prosecutor: Without going into the details underlying this I am going to ask you the following question. Between July 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and [the child]?

Laura: Yes.

Prosecutor: What was his response at the time?

Laura: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what [the child] said.

Prosecutor: And did you take any action or do anything at that time?

Laura: No I did not.

The admission of this testimony was not so egregious or damaging so as to render Bockting's trial fundamentally unfair. *See, e.g, Drayden v. White,* 232 F.3d 704, 710-11 (9th Cir. 2000). In light of the weight of all the other evidence supporting Bockting's guilt, it is highly unlikely that the jury relied on this brief testimony in finding Bockting guilty of sexual assault.

b. Prosecutorial Misconduct

Bockting's allegations of prosecutorial misconduct in his petition are less than cohesive, however, he generally claims that the prosecutor in his trial was guilty of: (1) shifting the burden of proof to the defendant; (2) commenting on the defendant's right to remain silent; (3) making inflammatory comments which were not supported by evidence presented at trial; and (4) vouching for the credibility of witnesses. Bockting claims that the cumulative effect of this alleged misconduct together with the admission of the evidence of a prior bad act[4] violated his constitutional right to due process. This court finds no such constitutional violation.

Bockting contends that the prosecutor impermissibly shifted the burden of proof to the defense when, in closing argument, he pointed out to the jury that the defense had not been able to explain how the victim had received a rectal injury. Bockting also claims that the prosecutor's comments

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[4] In making his "cumulative effect" argument, Bockting includes the admission of evidence of prior bad acts as an instance of prosecutorial misconduct. It is more properly characterized as an evidentiary issue, which is why this court analyzed it separately as such.

in this regard amounted to a statement that Bockting's exercise of his right to remain silent was an admission of guilt. There is no merit to either argument.

At Bockting's trial, the jury was duly instructed that the defendant was presumed innocent and that the State had the burden of proving every material element of the charged crimes beyond a reasonable doubt. The prosecutor's comments, rather than shifting the burden of proof, merely highlighted the strength of the State's case on a material element of sexual assault. The essence of the comments was that the State had proved that element beyond a reasonable doubt and that the defense had presented no evidence to the contrary. As such, the prosecutor's comments were within the bounds of permissible closing argument.

The prosecutor's comments were also not an improper comment on Bockting's exercise of his right to remain silent. As noted in *United States v. Mendes*, 43 F.3d 1298, 1301 (9th Cir. 1995), in considering the propriety of prosecutorial comments there is "a distinction between a comment on the defense's failure to present exculpatory evidence as opposed to a comment on the defendant's failure to testify." Comments of the former type are permissible as long as they are not phrased so as to call attention to the defendant's failure to testify. *Id.* Also, a comment as to the failure of the *defense*, as opposed to the *defendant*, to counter or explain prosecution evidence does not implicate a defendant's Fifth Amendment rights. *Id.* When considered based on these standards, the prosecutor's comments as to the defense's failure to explain the victim's rectal injury are beyond constitutional challenge, especially in light of the fact that Bockting chose to testify at trial.

Bockting claims that the prosecutor's references in closing argument to the victim's crying during the aborted effort to have her testify were inflammatory and not based upon "evidence" presented at trial. Bockting also cites statements in which the prosecutor referred to the trust that children have in adults and in which the prosecutor conjectured what the victim would say if asked a specific question. This court agrees that the prosecutor engaged in misconduct by referring to the victim's crying episode, which was not admissible evidence, and by speaking on behalf of the victim in the first person. *See, Drayden,* 232 F.3d at 712-13. This finding alone, however, does not serve as a basis for habeas relief. As set forth more fully in the cumulative error analysis below, the inquiry for the federal habeas court is not whether error occurred, but rather, whether such error was of constitutional magnitude. *Id.* at 713.

Bockting's final claim of prosecutorial misconduct is that the prosecutor improperly vouched for the credlbility of the State's witnesses and gave his own opinion that it would have been impossible for the victim's mother to have induced the victim to fabricate a story of sexual abuse. In this regard Bockting challenges the prosecutor's statement that testimony of Dr. Rivers "is probably some of the most important testimony that you heard . . . because it tells you something that is real, that you could see, that is not what somebody thinks." The prosecutor also made several references in his closing argument to Laura Bockting's truthfulness and candor. Finally, the prosecutor stated, in reference to the testimony of a family therapist who treated the victim, that he thought "her opinion was straightforward."

A prosecutor engages in impermissible "vouching" when he either (1) places the prestige of the government behind a witness through personal assurances of the witness's

truthfulness or (2) suggests that information not presented to the jury supports the witness's testimony. *United States v. Jackson,* 84 F.3d 1154, 1158 (9th Cir. 1996). Here, the prosecutor did not impermissibly vouch for the testimony of either Dr. Rivers or the family therapist. With regard to his comments about the testimony of Dr. Rivers, the prosecutor was merely juxtaposing the gynecologist's empirical conclusions based on her medical examination of the victim with conclusions of other witnesses which were more speculative. Similarly, by stating that the family therapist's opinion was straightforward, the prosecutor was not giving his personal assurance that the her testimony was truthful. Instead, he was accurately describing her *opinion* as plain, non-evasive and free from ambiguity.

This court also finds no misconduct in the prosecutor's statements as to the impossibility of the victim having been coached by her mother to fabricate a story of sexual abuse. Such statements were, for the most part, inferences drawn from evidence presented at trial and well within the bounds of permissible argument.

The prosecutor's repeated references to the truthfulness of Laura Bockting's testimony did, however, constitute impermissible vouching. Even so, as noted above, an instance of prosecutorial misconduct does not necessarily deprive the defendant of his or her constitutional rights. The issue for this court to decide is whether the cumulative effect of trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Thomas v. Hubbard,* 273 F.3d 1164, 1179 (9th Cir. 2002) (quoting *Donelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). This analysis is similar to the inquiry set forth in *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) which asks whether

an error had "a substantial and injurious effect" On the outcome. *Thomas*, 273 F.3d at 1179-80.

Here, the instances of prosecutorial misconduct did not have a "substantial and injurious effect" on the outcome of Bockting's trial. If the Laura Bockting's testimony stood alone as on the only evidence recounting the episode of sexual abuse suffered by the victim, then the prosecutor's vouching for her testimony may have been sufficient to establish a due process violation. However, this evidence was also provided by Detective Zinovitch's testimony. Thus, the most incriminating portions of Laura Bockting's testimony, rather than being the lone pillar supporting a material element of the State's case, was corroborated, and practically duplicated, by the detective's testimony.

Adding any prejudice that may have resulted from the inflammatory prosecutorial statements discussed above does not tip the scale in favor of finding a violation of Bockting's due process rights. Such prejudice was minimized by instructions given to the jury. The jury was instructed that its verdict was not to "be influenced by sympathy, prejudice, or public opinion," but instead should be "a product of sincere judgment and sound discretion in accordance with" the rules of law set forth in the jury instructions. It was also instructed that "[s]tatements, arguments and opinions of counsel are not evidence in the case." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31). Also, strong evidence of Bockting's guilt was presented at trial: medical evidence that the victim's vagina and rectum had been penetrated; Detective Zinovitch's testimony regarding the account of sexual abuse that had been related to him by the victim; and Bockting's admission that no other male individual had been alone with the victim during the time that the abuse most likely occurred. *See, Drayden*, 232 F.3d at

713. Thus, prosecutorial misconduct did not render Bockting's trial "fundamentally unfair." *Id.*

Finally, this result would not be impacted by a conclusion that the trial court's admission of the prior bad act evidence was in error. As discussed above, this evidence was so limited as to have minimal prejudicial effect. Thus, even if considered as an additional component of cumulative error, Bockting still received a constitutionally fair trial.

3. Ground Three

As Ground Three, Bockting claims that he was deprived of his Sixth Amendment right to effective assistance of counsel both at his criminal trial and in his subsequent appeal. As noted above this court previously categorized this ground into five separate claims, two of which the court found unexhausted. The three remaining claims of unconstitutional ineffective assistance of counsel are as follows: (1) trial counsel failed to adequately investigate, prepare, or present a defense based on the theory that the child victim's mother had "coached" the victim and had otherwise manufactured evidence against the petitioner; (2) trial counsel failed to raise objections to errors in the trial court proceedings which resulted in the admission of prejudicial evidence and argument and the inability to raise such errors as issues on appeal; and (3) appellate counsel failed, in handling the appeal of Bockting's conviction, to adequately research and present appealable issues to the state supreme court.

Ineffective assistance of counsel claims are governed by the standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that his trial counsel's

performance fell below an objective standard of reasonableness and that, as a result, the result of his trial is unreliable. 466 U.S. at 687-688. Put another way, "[t]o prevail on a claim of ineffective assistance of counsel, [petitioner] must show that his trial counsel's performance fell outside a wide range of reasonableness and that he was prejudiced by that performance. Prejudice occurs where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Weighall v. Middle,* 215 F.3d 1058, 1062 (9th Cir. 2000) (quoting *Strickland,* 466 U.S. at 694). Habeas petitioners claiming ineffective assistance of counsel must affirmatively demonstrate prejudice. *Cooper v. Calderon,* 255 F.3d 1104, 1109 (9th Cir. 2001).

a. Failure to Pursue "Coaching" Theory

In support of his claim that his counsel failed to pursue a viable defense theory, Bockting contends that his trial counsel should have attempted to develop evidence which Bockting claims would have demonstrated that Laura lacked credibility and that she induced the victim into making false accusations against him. Bockting asserts that, to this end, his counsel should have interviewed the six year old victim and subjected her to an independent psychological examination. He also claims that counsel should have further investigated an alleged visit Laura Bockting made to the state welfare office the day before she reported the sexual abuse of her daughter.

At the State court evidentiary hearing with regard to Bockting's petition for post conviction relief, a memorandum written by Bockting's trial counsel and dated May 5, 1988, – three months prior to Bockting's trial – was introduced into

evidence. This memorandum states that counsel had considered requesting an independent psychological evaluation of the victim, but chose not to after Bockting clearly failed a polygraph examination. According to the memorandum, counsel feared that the results of such an evaluation would be damaging to the defense in that such results would indicate that the victim was probably telling the truth. Trial counsel also testified at the evidentiary hearing that he had conducted some inquiry into Laura's purported visit to the welflhre office, but did not consider the information derived from that inquiry to be particularly compelling or relevant. Finally, with regard to trial counsel's failure to interview the victim, the prosecutor represented to the court at the evidentiary hearing that neither the victim nor her mother were willing to speak with defense counsel.

The Eight Judicial District Court found that Bockting's defense theory was supported by only his unsubstantiated allegations and that counsel's performance was not deficient because "no amount of investigation would have made [Bockting's] 'substantial defense' viable." The state court also found no showing of prejudice. While the question of ineffective assistance of counsel is a mixed question of law and fact, *see Strickland, supra,* 466 U.S. at 697, whether counsel conducted an adequate investigation is an issue of fact. This court is required to presume the correctness of factual determinations made in the state courts. 28 U.S.C. § 2254(e)(1). The state court's determination that Bockting's counsel conducted an adequate investigation into Bockting's defense theory is presumptively true.

The presumption of correctness may only be overcome by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Jeffries v. Wood,* 114 F.3d 1484, 1500 (9th Cir.), *cert. denied* 522 U.S. 1008 (1997). In this case,

Bockting has provided no evidence which remotely approaches this standard. He makes bare allegations in his habeas petition regarding Laura Bockting's unreliability and possible motives, but he has not brought this court's attention to any *evidence* of stones left unturned by his trial counsel which would have supported a defense theory that the victim's mother fabricated evidence against Bockting. Consequently, even in the absence of the presumption created by the state court's findings of fact, this court would be unable to find that Bockting's trial counsel's performance fell below constitutional standards. As such, this court need not inquire into the "prejudice" prong of the *Strickland* test.

b. Failure to Object to Trial Court Errors

Bockting asserts that his trial counsel wasineffective for not objecting to the admission of prior bad acts evidence or to the instances of prosecutorial misconduct discussed in Section B.2. above. Bockting claims that, as a result, the jury heard prejudicial testimony and argument that should have been excluded at trial and such instances of trial court error were not preserved as issues for appeal.

The "prejudice" prong of the *Strickland* test (i.e., demonstrating a reasonable probability that the outcome of the trial would have been different but for counsel's errors) closely parallels the *Donnelly* standard this court used above to determine whether cumulative error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Any distinction between these two tests does not alter this court's conclusion that Bockting's constitutional rights were not violated. For the same reason it finds that any cumulative error did not result in a deprivation of Bockting's due process rights, this court also finds that Bockting cannot demonstrate a "reasonable likelihood" that the result of his

trial would have been different if the jury had not been exposed to any prosecutorial misconduct or evidence of prior bad acts.

Bockting's claim that he was also prejudiced because these issues were not properly preserved for appeal are addressed below.

a. Failure to Raise Issues on Appeal

The *Strickland* standard also applies in evaluating whether appellate counsel was unconstitutionally ineffective. *Smith v. Robbins,* 528 U.S. 259, 285 (2000). Appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when such issues would not have provided grounds for reversal. *Wildman v. Johnson,* 261 F.3d 832, 840 (9th Cir. 2001).

The Nevada Supreme Court maintains an elevated standard for obtaining the reversal of a conviction where the appellant's claim is prosecutorial misconduct or the improper admission of prior bad acts evidence. In either case, the Nevada Supreme Court will not reverse a conviction unless it is persuaded that the result of the defendant's trial would have been different but for the claimed errors. *See, e.g., King v. State,* 998 P.2d 1172, 1175-77 (Nev. 2000). For the reasons set forth herein, Bockting cannot show that there is a reasonable likelihood that the outcome of his trial depended on prosecutorial misconduct or the admission of prior bad acts evidence, even considering the cumulative effect of such claimed error.

C. Conclusion

In summary, this court finds that any errors committed by the state court in convicting Bockting do not rise to the level of constitutional violations justifying habeas relief. In addition, Bockting has not demonstrated that his Sixth Amendment right to effective assistance of counsel was violated under the *Strickland* test. Consequently, Bockting's petition for federal habeas relief will be denied.

IT IS THEREFORE ORDERED that petitioner's second amended petition for writ of habeas corpus (Docket #35) is **DENIED**. The Clerk shall enter Judgment in respondents' favor and against the petitioner.

Dated this 19 day of March, 2002.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

SUPREME COURT OF NEVADA

No. 19524

[Filed March 8, 1993]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Remand from United States Supreme Court after vacating prior order dismissing appeal, ordering further consideration of an appeal from a conviction of three counts of sexual assault on a minor under the age of fourteen years. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Affirmed.

JUDGES: Rose, C.J., Steffen, J., Young, J., Springer, J.

OPINION

PER CURIAM:

Appellant Marvin Howard Bockting was arrested and charged with four counts of sexual assault on his six-year-old stepdaughter: counts I and II, forcing vaginal and anal intercourse upon the child; count III, compelling the victim to perform fellatio upon him; and count IV, forcing the child to submit to cunnilingus. Bockting was convicted on Counts I, II and III.

Bockting appealed to this court, contending that his constitutional right to confront adverse witnesses had been denied. More specifically, Bockting insisted that he was deprived of his right to cross-examine his stepdaughter because unreliable hearsay statements attributed to her were admitted into evidence pursuant to NRS 51.385. Concluding that Bockting's arguments were meritless, we ordered the appeal dismissed.

Bockting successfully petitioned the United States Supreme Court for a writ of certiorari. After vacating this court's order dismissing appeal, the Supreme Court remanded Bockting's appeal to us for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

FACTS

Bockting and the child victim's mother, Laura, were married in early 1984. Eventually the couple, Laura's daughter, and a child born to Bockting and Laura, made their way to Las Vegas, where they obtained one-bedroom accommodations in a hotel. Bockting worked as a handyman

at various jobs during the day and took care of the children at night while Laura attended business college.

On Saturday evening, January 16, 1987, while Bockting was away, his stepdaughter woke up frightened and sobbing. Despite prior threats by Bockting that he would "beat her butt" and that "mom would make dad leave," the stepdaughter eventually told her mother about the sexual attacks she had suffered at the hands of Bockting.[1]

Laura asked her daughter when these activities occurred and the child said it happened a lot and that the last occurrence was while the child's mother was in school. Because the disclosures were made after Laura had been in school for only one week, the last incident must have transpired within that week.

On Tuesday, January 19, 1987, Laura took her daughter to the hospital, where Dr. Stacy Rivers, a gynecologist and obstetrician, examined the child under a general anesthetic. The examination by Dr. Rivers revealed a tear in the rectal sphincter and a wide opening in the hymenal ring.

Detective Charles Zinovitch attempted to question the visibly distraught child at the hospital, but because she was so upset, her only response was that someone had hurt her. Two days later, however, Detective Zinovitch was able to effectively communicate with the victim at his office. There, in a room specially designed to enable children to feel

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[1] After being reassured by her mother, the young victim explained that Bockting had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," and that "he put his chin on her pee-pee."

comfortable and at ease while being interviewed, the child gave the detective the same information she had conveyed to her mother. Detective Zinovitch asked the girl various questions to determine the consistency and authenticity of her statements.[2] The child's third recitation of the events occurred when she demonstrated the incidents with the use of anatomically correct dolls. Her depiction of the acts reflected "correct" positioning of the dolls, representing Bockting and herself during the various sexual acts, as well as correct placement of the doll's genitalia.[3] Subsequent to the interview, Bockting was arrested and charged with four counts of sexual assault.

At the preliminary hearing, the prosecutor questioned the child concerning the incidents with Bockting. She was able to describe the surroundings, but stated that her pants were never removed and that she could not remember how Bockting touched her. She testified that she remembered

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[2] When asked what was meant by her "pee-pee," the child responded by pointing between her legs. Similarly, when asked where a man's "pee-pee" was, she said it was between his legs. When discussing in child's terms the subject of fellatio, she descriptively stated that "white bubbly stuff came out of Bockting's pee-pee" and went into her mouth.

[3] Near the outset of the interview, Detective Zinovitch told the child that he might show her some dolls, but made no mention of the nature of the dolls. After the child had been able to describe to the detective what had happened to her, and the detective had thus heard all that he felt was necessary for a complete interview, the child asked if she could then see the dolls. In response, the detective produced the anatomically correct dolls, and the child was able to select the adult male doll and the "little girl" doll, and thereafter demonstrate to the detective through use of the two dolls what Bockting had done to her.

talking to her mother and Detective Zinovitch, but could not remember what she told them. The judge asked Laura to accompany her daughter on the stand in an effort to enable the child to respond to questions. The effort proved futile, however, and the judge declared the child unavailable as a witness.

At trial, a hearing was held outside the presence of the jury where the six-year-old child was called to the stand and was uncommunicative when requested to take the oath. Efforts to persuade her to cooperate were of no avail and the judge, at the request of the prosecutor, declared the child unavailable for purposes of testifying. The prosecutor then attempted to have the child's hearsay statements to her mother and Detective Zinovitch admitted pursuant to NRS 51.385. The prosecutor had earlier supplied the defendant with the statutorily required notice of the State's intention to have the hearsay statements introduced at trial.

At the hearing mandated by NRS 51.385(1)(a), the victim's mother and Detective Zinovitch testified concerning the child's statements to them and the circumstances under which the statements were made. The court admitted the hearsay statements--as well as the victim's inconsistent statements made at the preliminary hearing--based upon the terminology, rationality, plausibility and consistency of the statements made to the mother and the detective.

DISCUSSION

When this court first reviewed Bockting's appeal challenging the admissibility of the victim's hearsay statements to her mother and the investigating officer, we concluded from the record that the district court did not err in ruling that the child victim was unavailable as a witness and

that the hearsay evidence was reliable. We therefore dismissed Bockting's appeal as meritless. Upon remand from the United States Supreme Court, we have reconsidered our prior ruling in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), and are convinced that Bockting's convictions must again be affirmed.

The single issue before us concerns the delicate balance between the State's right at trial to introduce an unavailable[4] child victim's hearsay statements and a defendant's right of confrontation under the Sixth Amendment to the Federal Constitution. Directly implicated in our analysis is NRS 51.385, the Nevada statute providing the basis for the hearsay

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[4] Although NRS 51.385 does not require the unavailability of the hearsay declarant as a prerequisite to the admissibility of the declarant's statements, we are satisfied on this record that the trial judge correctly determined that the child was unavailable as a witness. The record reveals, as described by the prosecutor, that the child "froze" and would not even stand or communicate to take the oath. Moreover, defense counsel did not contest the district court's ruling concerning the child's unavailability as a witness.

We therefore conclude that it is unnecessary to presently decide whether unavailability is a prerequisite to the admissibility of out-of-court statements by alleged child-victim declarants where the statements do not fall within firmly rooted hearsay exceptions. We note, however, that as a general proposition, it appears that the trend in both the state and federal courts is to not make admissibility dependent upon unavailability. Furthermore, in the context of firmly rooted hearsay exceptions, the United States Supreme Court recently held that the confrontation clause of the Sixth Amendment does not require either the production of the declarant at trial or a determination by the trial court that the declarant is unavailable. *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992).

exception invoked by the State, and the decision of the United States Supreme Court in *Idaho v. Wright*.

THE CONSTITUTIONALITY OF NRS. 51.385

NRS 51.385, in its entirety, provides:

> **51.385 Admissibility; notice of unavailability or inability of child to testify.**
>
> 1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:
>
> (a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
>
> (b) Child either testifies at the proceeding or is unavailable or unable to testify.
>
> 2. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

The statute, enacted in 1985, was designed to address mounting societal concerns over what is generally perceived to be the rapidly growing menace of child sexual abuse. Usually, the younger the child, the greater the difficulty in achieving criminal accountability because of the sequestered setting in which the crime is usually committed, and the limited ability of very young victims to communicate the nature and extent of their travails. Sexual crimes involving

children of tender years thus strain the capacity and flexibility of the criminal justice system to sensitively--and constitutionally--accommodate effective prosecution.

Fortunately, it has been determined that the Confrontation Clause does not require that a defendant be given the absolute right to confront and cross-examine adverse witnesses. Thus, in *Wright*, the Court observed that "[w]e reaffirmed only recently that '[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme."'" *Wright*, 497 U.S. at ___, 110 S. Ct. at 3145 (quoting both *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), and *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)); *see also Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (where necessary, Confrontation Clause permits the admission of hearsay statements despite inability of defendant to confront declarant at trial).

Having thus concluded long ago that the Confrontation Clause does not invariably require the right to confront, the Supreme Court more recently announced two criteria for the admissibility of hearsay statements that will satisfy Sixth Amendment constraints where the declarant is unavailable for cross-examination. First, the Confrontation Clause usually requires the prosecution to demonstrate that the declarant is unavailable. Second, upon a showing of unavailability, the hearsay statement may be admitted if: (1) the statement satisfies the indicia of a "firmly rooted" hearsay exception; or (2) the statement reflects "particularized guarantees of

trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).[5]

Facially, NRS 51.385 satisfies the *Roberts* criteria for admissibility despite the unavailability of the declarant and the resultant lack of opportunity to confront. We recognize that the hearsay exception created by the statute is not "firmly rooted" in the law of evidence. However, it does require a finding validated by a special hearing that "the time, content and circumstances of the statement provide sufficient circumstantial *guarantees of trustworthiness*." NRS 51.385(1)(a) (emphasis added). The statutory language is

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[5] In the recent case of *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992), the Court reaffirmed its earlier clarification of Roberts as enunciated in *United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) ("*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts"), and concluded that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White*, ___ U.S. ___ at ___, 112 S. Ct. at 741. As noted in footnote 4, *supra*, however, the question in *White* concerned whether it was necessary for the prosecution to produce the hearsay declarant at trial or the trial court to find the declarant unavailable as a predicate to the admissibility of out-of-court statements that fell within a firmly rooted hearsay exception.

In the instant case, the child's out-of-court statements are not within the category of a firmly rooted exception. We have elected not to decide whether a determination of unavailability is necessary where, as here, the out-of-court statements are admitted under the general hearsay exception founded upon guarantees of trustworthiness, as we have concluded that the child victim was, in fact, unavailable to testify at trial.

designed, by reference to "time, content and circumstances," to provide *particularized* guarantees of a statement's trustworthiness. We therefore conclude that NRS 51.385 is constitutional on its face.[6]

THE CONSTITUTIONALITY OF NRS 51.385 AS APPLIED

The application of the standard provided in *Roberts* was a primary focus of *Idaho v. Wright*. The *Wright* court determined that the Constitution does not impose a fixed set of procedural prerequisites to the admission of hearsay attributable to children. *Wright*, 497 U.S. at ___, 110 S. Ct. at 3148. Nevertheless, the Court adverted to several non-exclusive factors that may be significant in determining the reliability of hearsay statements referable to children in child sexual abuse cases. The factors identified by the Court included: (1) spontaneity and consistency in repetition; (2) declarant's mental state; (3) use of unexpected terminology by child of a given age; and (4) absence of motive to fabricate. Disavowing mechanical tests for determining particularized guarantees of trustworthiness, the Court declared that "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3150.

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[6] Courts in other jurisdictions have upheld similar statutes against constitutional attack. *See State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986); *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (Kan. 1985); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (Wash. 1984).

Although NRS 51.385 is not the codification of a firmly rooted hearsay exception, the statute does provide a proper forum for the evaluation and determination of the trustworthiness of child hearsay outside the presence of the jury. In such a setting, reliability may be more vigorously contested and more accurately discerned. In any event, with justifiable deference to the "unifying principle," our review now focuses on the facts of the instant case measured against the guidelines enunciated by the *Wright* court.

First, the circumstances under which the child victim initially revealed the incidents upon which the criminal charges were based generate an intuitive sense of trustworthiness. During the night, the child awoke from her sleep distressed and sobbing, and sought solace from her mother. The visibly upset six-year-old, after receiving assurances from her mother, provided the details of what had been happening to her. It strains credulity to conclude, under the conditions described, that the child's mentation would conjure up the parade of horrors she related about her stepfather. Moreover, the child's outpouring to her mother reflected a natural spontaneity indicative of truth.

The young victim's second recitation of Bockting's criminal behavior occurred during her interview with Detective Zinovitch in the latter's office. There, the girl's restatement of her travails was consistent with the details she had previously told to her mother.

The child's third consistent description of the events came when, of her own volition, she asked for dolls, and received the anatomically correct dolls. With the dolls, she demonstrated the various positions involved in the commission of the crimes. Again, the child's explanations and demonstrations with the dolls were sufficiently

spontaneous to inspire confidence in their reliability. *See generally D.A.H. v. G.A.H.*, 371 N.W.2d 1 (Minn. Ct. App. 1985) (child's statements to psychologist admitted, statements were spontaneous even with the passage of time). The girl's two verbal descriptions and the demonstrations and explanations connected with the dolls indicate consistent repetition in her out-of-court statements that adds an element of trustworthiness. *See* J. Myers, Child Witness Law and Practice § 5.37, at 367 (1987). Moreover, we were pleased to see that the veteran detective conducted the recorded interview with the child in a manner that was not suggestive, leading, or indicative of a predetermined resolve to produce evidence of child abuse.

The language used by the victim in describing what her stepfather had done to her was consistent with that expected of a six-year-old child. During her explanations of the sexual attacks, the child used such child-like terms and descriptions as "pee-pee," "butt," and "sucking on his pee-pee like a sucker" until "white bubbly stuff came out" and went into her mouth. She also described and demonstrated through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child. In explaining how the act of anal intercourse occurred, she told how she held onto the sink while Bockting was behind her and "would press real hard and it hurt." The terminology used by the girl indicated a familiarity with sexual conduct not usually known by six-year-olds.[7] Further,

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[7] We note, however, that the victim's mother testified that her daughter had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults. Although the mother testified to the contrary, Bockting stated that the child saw the couple engaging in oral sex,

the child's statements reflect knowledge of sexual acts that a child of six would not usually be aware of absent personal experience.

Prior to describing her stepfather's conduct to her mother, the child hesitated because she was afraid Bockting would "beat her butt" and "mommy would send daddy away." After the victim's mother confronted Bockting and told him to leave, the girl wanted to hug and kiss him. This conduct is inconsistent with the notion that the six-year-old did not like her "father" or that she wanted him out of the home. In fact, the child's actions reflect feelings of affection for her stepfather. There was no apparent reason or motive for the child to fabricate a story of sexual misconduct by Bockting. "[I]t is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a story such as the one told by [the child victim]." *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988).

A careful comparison of the factors accorded significance in *Idaho v. Wright* with those present in the instant case causes us to conclude that: (1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather

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in addition to vaginal intercourse. Bockting also testified that the little girl was "interested" in sex.

than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate. Neither the foregoing factors nor any other aspect of the record evidence provides insights into a motive for dissembling on the part of the child. We therefore conclude that the district court was justified in finding that the child's hearsay statements were reliable and admissible under the criteria specified in NRS 51.385 and *Idaho v. Wright*.[8]

---

[8] The majority in *Idaho v. Wright* determined that for purposes of satisfying the requirements of the Confrontation Clause, corroborating evidence is not to be considered in determining the reliability of hearsay statements. 497 U.S. at 821, 110 S. Ct. at 3150. This point has been vigorously criticized by legal scholars and by Justice Kennedy and the three other justices who joined in his dissent. Of necessity, we have reluctantly adhered to the majority opinion in our resolution of this appeal. We would, however, most respectfully urge the Court to reconsider the majority view.

Aside from relevancy, the *sine qua non* of admissible evidence is reliability. Indeed, the *Wright* majority validates the admissibility of hearsay statements falling within firmly rooted exceptions on the basis of the indicia of reliability upon which they are founded. It appears to us that "corroborative evidence," as it relates to hearsay statements proffered on the basis of particularized guarantees of trustworthiness, is evidence that tends to make the reliability of the hearsay statement more probable. Such evidence seems to have special significance and justification under the "reliability" hearing mandated by NRS 51.385. The greater the corroboration, it would appear, the greater the prospect of the statement's trustworthiness. In the context of the instant case, the fact that medical evidence confirms that the child had been violated and injured by some blunt force which could include an erect adult penis, created an added element of reliability to the child's statements. The fact that there was no evidence of the victim being in the care of any adult male other than the defendant during the relevant period, was probative

In viewing the totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*, we conclude that the district court did not err in finding sufficient "particularized guarantees of trust-worthiness" to admit the proffered statements. We therefore hold that NRS 51.385 is constitutional as applied to Bockting and his rights under the

---

of reliability concerning both the fact of sexual abuse and the identity of the abuser. And yet, under the *Wright* ruling, we were forced to disregard these "particularized" sources of evidence of trustworthiness.

It would also appear difficult to accurately assess the "lack of motive to fabricate" factor identified by the Wright majority without resort to evidence extraneous to the "circumstances surrounding the making of the out-of-court statement." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3149. For example, if it is necessary to exclude medical evidence of sexual abuse, it would also appear necessary to exclude evidence of marital discord on the part of the parents as a possible motive in the mother for having the child fabricate charges of sexual abuse against the husband. Moreover, the conclusion of the *Wright* majority that "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement," 497 U.S. at 805, 110 S. Ct. at 3151, seems to assume that any truth less than the entire truth is more dangerous than little or no truth at all. Even the firmly rooted exceptions to the hearsay rule are based upon probabilities short of certainty. In any event, the corroborative evidence is not, in the first instance, produced for a jury to consider in weighing the reliability of the proffered hearsay. It is the trial judge who must, under the totality of the circumstances, determine whether there are "sufficient circumstantial guarantees of trustworthiness" to permit introduction of the statement. NRS 51.385(1)(a). We are confident that our trial judges are sufficiently trained to use corroborative evidence as but one additional factor to weigh in determining the extent to which such hearsay statements bear indicia of reliability.

Confrontation Clause.

For the reasons stated above, we conclude that Bockting was fairly tried and convicted. Accordingly, we affirm the judgment of conviction entered by the district court.[9]

/s/_____
Rose, C.J.

/s/_____
Steffen, J.

/s/_____
Young, J.

/s/_____
Springer, J.

---

[9] The Honorable Miriam Shearing, Justice, did not participate in the decision of this matter.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 89-5396

[Filed June 28, 1990]

Marving Howard BOCKTING Petitioner	)
v.	)
NEVADA	)

On Petition for Writ of Certiorari
to the Supreme Court of Nevada

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy.

OPINION

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Nevada for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

APPENDIX H

SUPREME COURT OF NEVADA

No. 19524

[Filed June 22, 1989]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

ORDER DISMISSING APPEAL

Appellant Marvin Howard Bockting was charged with sexual assault on his six-year-old stepdaughter. During the preliminary hearing and at trial, the victim did not cooperate in answering questions about the assault. Thus, the judge invoked NRS 51.385(1)[1] which permits the child's hearsay

[1] NRS 51.385(1) provides as follows:

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing the act of sexual conduct performed with or on the child is admissible in a

statements concerning the assault to be admitted into evidence. The victim's mother and a police detective both testified that the victim had told them about Bockting's assault.

Bockting claims that NRS 51.385(1) is unconstitutional because the United States Supreme Court ruled in *Coy v. Iowa*, ___ U.S. ___, 108 S. Ct. 2798 (1988), that the confrontation clause gives the defendant the right to confront witnesses face-to-face. While there are some similarities between *Coy* and the instant case, the procedure used in this case did not violate Bockting's sixth amendment rights.

The Supreme Court's holding in *Coy* is narrow. The Court found that the Iowa statute in question made only a generalized finding -- "a legislatively imposed presumption" -- that not allowing the child victim to see the defendant would be in the best interest of the child. The Court then held that "something more than the type of generalized finding underlylng such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* at 2803 (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

The legislature does not make a "generalized finding" that not having the child victim testify is in the best interest of the child. Instead, the statute provides for a hearing out of the

---

criminal proceedings regarding that sexual conduct if the:

(a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) Child either testifies at the proceeding or is unavailable or unable to testify.

presence of the jury to determine if the hearsay testimony is trustworthy and if the child is unavailable or unable to testify. Only upon making these findings may a court admit into evidence the out-of-court declarations of a child victim. This procedure specifically comports with the Supreme Court's requirements for admitting hearsay evidence in a criminal proceeding: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

The district court in this case found that the victim was unavailable as a witness and found that the hearsay evidence was reliable. Since proper admission of hearsay evidence has long been held not to be a violation of the confrontation clause, we do not agree with Bockting that NRS 51.385(1), allowing admission of out-of-court statements by child victims, is unconstitutional when measured against the confrontation clause of the sixth amendment.

We also conclude that Bockting was not prejudiced by the violation of the rule of exclusion when the court allowed the victim's mother to remain in the courtroom while the victim testified. The record clearly shows that the testimony of the victim's mother was the same before and after she heard what little the victim had to say in the preliminary hearing. *See Givens v. State*, 99 Nev. 50, 657 P.2d 97 (1983).

Having decided that all of Bockting's contentions on appeal lack merit, we

ORDER this appeal dismissed.

/s/ _____
Young, C. J.

/s/ _____
Steffen, J.

/s/ _____
Springer, J.

/s/ _____
Mowbray, J.

/s/ _____
Rose, J.

ORIGINAL (8)

Supreme Court, U.S.
FILED
DEC 12 2005
OFFICE OF THE CLERK

No. 05-595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS, Petitioner

v.

MARVIN HOWARD BOCKTING, Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RECEIVED
DEC 23 2005

No. 05-595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS, Petitioner

v.

MARVIN HOWARD BOCKTING, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent Marvin Howard Bockting, asks for leave to file the attached Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed in *forma pauperis.* Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for Respondent under the Criminal Justice Act of 1964, 18 U.S.C. §3006A. *See* Supreme Court Rule 39.1.

Dated this 12th day of December 2005.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender
Counsel for Respondent

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STATEMENT OF THE CASE

Procedural History

Marvin Bockting went to trial in Las Vegas Nevada and was found guilty by a jury of three counts of sexual assault and acquitted of one count of sexual assault of his stepdaughter, who was seven years old at the time of the trial. Bockting was sentenced to three life sentences, two of the sentences to run consecutively.

Bockting appealed his conviction to the Nevada Supreme Court raising only two issues: 1) the constitutionality of admitting the hearsay statements of the child witness; 2) the denial of defendant's motion to prevent the mother of the child from testifying. The Nevada Supreme Court dismissed the appeal on June 22, 1989. A Petition for Writ of Certiorari was filed with the U.S. Supreme Court and the case was remanded for reconsideration in light of Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed. 2d 638 (1990). The Nevada Supreme Court reconsidered its decision and entered an Opinion affirming the conviction on March 8, 1993. Bockting filed a Petition for Post Conviction Relief in the state court on March 30, 1994 setting forth specific factual issues with regard to his Ineffective Assistance of Counsel claims. On July 6, 1994, the state court held an ex parte evidentiary hearing at which testimony was taken from Bockting's trial counsel. Bockting was not transported to court, was not represented and was not present. The court denied the Petition on September 15, 1994. Bockting appealed and the Nevada Supreme Court entered an Order Dismissing that Appeal on December 24, 1997.

Bockting filed a Petition for Writ of Habeas Corpus in federal court on December 30, 1998. Bockting filed a Second Amended Petition for Writ of Habeas Corpus on May 17, 2000. The

district court, without holding a hearing or appointing counsel, denied the Petition in a written Order on March 22, 2002.

Counsel was appointed by the Ninth Circuit Court of Appeals to represent Bockting on appeal. The case was briefed and argument was heard on January 14, 2004. On March 8, 2004, before a decision was rendered, the case of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) was decided by this court. Supplemental briefing was filed and on February 22, 2005, the panel filed an Opinion granting Bockting's Petition for a Writ of Habeas Corpus. A Petition for Rehearing and Suggestion for Rehearing En Banc was filed by the Attorney General. On June 1, 2005, an Amended Opinion was filed by the original panel and Rehearing and En Banc consideration was denied.

Factual Summary

The Ninth Circuit summarized the facts pertinent to the Crawford issue as follows:

> Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Bockting v. Bayer, 399 F.3d 1010, 1012 (2005).

Autumn testified at the Preliminary Hearing but her testimony was inconsistent with regard to when or how the incident with her stepfather happened. Detective Zinovitch, who had received "on-the-job training with other more experienced detectives within the sexual assault unit," testified at the Preliminary Hearing that contact with the Police Department was not made until January 19, 1988, two days after the date Laura Bockting said that Autumn told her about the incident with her stepfather. On January 21, 1988, the detective interviewed Autumn at his office. He picked up Autumn and her mother and transported them to his office. He described Autumn

as "very talkative" and not frightened. The detective testified that Autumn described the same events that her mother testified to. The detective also testified that Autumn demonstrated the events with the use of anatomical dolls.

The prosecutor convinced the trial court that the child need not testify on the following grounds:

> My position is that the circumstances surrounding the giving of these statements in that they were unsolicited, to the extent that the statement given to Laura Bockting, the mother, was an unsolicited voluntary spontaneous-type statement, so I am satisfied. At least, I think that the State has met its burden that that is a genuine statement should be admitted.
>
> And also the statement to Detective Zinovitch because here is an experienced investigator, hundreds of sexual assault victims, and he is of the opinion that she was telling the truth and can even give reasons as to why he thinks she is telling the truth. So I think the guarantees of trustworthiness are sufficiently there.

The court ruled in pertinent part as follows:

> Concerning the reliability of the statements to Mrs. Bockting and Detective Zinovitch, looking at the statements isolated and on their own merit, I see no difficulty concerning their reliability.
>
> There does not seem to be a fabrication here in that they are not irrational or not plausible. They follow chronologically the events. They tell what the little girl's perception of it was and it seems to be credible, although I grant at the preliminary hearing there is a different version.
>
> I don't know what motivation it would be to misrepresent this, either. I have heard nothing in that regard...
>
> But concerning the law, strictly speaking, Mr. Blaskey has brought some cases to our attention here...which suggests that a 13-year old or two 13-year girls were assaulted and that witnesses were allowed to testify behind screens. I think that is a rather remarkably different situation than we have here.
>
> This statute indicates that a child under 10 years of age shall be allowed certain latitudes in their testimony. That, I think, is a very telling and very critical point to make.

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or **testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless**; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of setting.
>
> And this law was set in place, I think, to avoid some of the problems involved there with that kind of a testimony situation. **There seems to be nothing that would take our case out of the typical situation that the law had contemplated.** [emphasis added] .

The jury was permitted to hear Detective Zinovitch's recitation of the child's statements to him. Then the prosecutor called a "marriage and family therapist" to testify that she saw Autumn once a week starting in March 1988 based on a referral from the District Attorney's office. The "therapist" said that "Autumn appears not to want to deal with the sexual abuse. She doesn't want to talk about it. **She doesn't want to acknowledge that it happened.**" [emphasis added] .

Laura Bockting, an exotic dancer when she married Marvin Bockting in 1984 testified that the couple separated for eight months due to her alcohol and drug problems until two months before the claimed molestation in January, 1988. In January of 1988, the relationship between Laura and Marvin was described by Laura as "not happy" and they were arguing. Laura testified that the first thing she said to Marvin the day after Autumn talked to her on January 17th was "where is the money for the rent." She took the money, left Autumn with Marvin alone and paid the rent. When she returned, she confronted Marvin, and he denied any wrongdoing. Laura told Marvin she was going to take Autumn to be "checked" and Marvin said "I hope you do. I want you to." Laura said she waited two days to take Autumn to the hospital but she couldn't remember why she waited. She

said that calling the police department "never entered my mind." Laura did not testify that Autumn experienced painful urination or other pain in her vaginal or rectal area at any time.

There was medical evidence adduced at trial, although the defense did not hire an expert to prepare for or test the evidence. Dr. Stacy Rivers testified that her examination of Autumn revealed "a small tear that seemed to be healed–healing, I should say, and it was not bleeding at that time." She testified that "within a week there had been a tear of the rectal mucosa." She also found that the hymen was "gaping wide open although it was not bleeding" She testified that there was no other lacerations within the canal of the vagina or the rectum. She testified that the stretching of the hymen, had it occurred just prior to the examination would have caused pain to the area and painful urination during that time.

As he did at trial, Marvin Bockting has maintained his innocence throughout these proceedings.

REASONS FOR DENYING THE PETITION

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION FALLS SQUARELY WITHIN THE "THE NARROW CLASS OF RULES" WHICH DESERVE TO BE GIVEN RETROACTIVE EFFECT.

The Petitioner argues against giving retroactive effect to Crawford by claiming that, under Teague v. Lane,489 U.S. 288 (1989), the class of rules deserving retroactive effect should be so exceedingly small that new rules of procedure would almost never apply. Petitioner emphasizes a statement by this court in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2523 (2004) that the "class of rules (deserving retroactive effect) is extremely narrow, and 'it is unlikely that any...has yet

to emerge.'" (quoting Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001)). Petitioner argues that because the Summerlin decision was issued "well *after* Crawford" [three and a half months] (Petition, p. 14) the statement from Summerlin is somehow instructive on the retroactivity of Crawford. The Bockting Panel considered the Appellee's argument and rejected it as follows:

> Admonitions such as in Summerlin offer discouragement but no guidance. Because our job is not to conjure up hidden meaning [as Appellees now request] we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of Summerlin.

Bockting, 399 F.3d at 1016.

The Ninth Circuit decision in this case relied upon the reasoning and analysis in Summerlin to support its conclusion that Crawford should be given retroactive effect: "[j]uxtaposed, Summerlin actually underscores why the Crawford rule implicates the "fundamental fairness and accuracy of the criminal proceeding..." Bockting, 399 F.3d at 1016. Although Teague and its progeny set a strong presumption in favor of nonretroactivity, the bar is not absolute. Crawford's cross-examination requirement meets the Supreme Court's retroactivity criteria.

Unlike other cases involving important constitutional rights, including Ring, Crawford's impact on the accuracy of criminal proceedings is unequivocal. If Crawford does not fit within the class of retroactive procedural rules, it would be hard to conjure up a rule that would.

The language of this court in Crawford provides the best evidence that the Supreme Court saw the rule as essential to an accurate and fair proceeding:

Accuracy of the Trial

> Nothing can be more essential than the cross examining [of] witnesses...124 S.Ct. at 1362.

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. 124 S.Ct. at 1366-67.

...the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. 124 S.Ct. at 1370.

The ambiguity of [the hearsay statements] made it all the more imperative that they be tested to tease out the truth. 124 S.Ct. at 1373.

...we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. 124 S.Ct. at 1373.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. 124 S.Ct. at 1377 (Concurring Opinion)

Bedrock Principles Essential to Fairness of the Proceeding

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. 124 S.Ct. at 1359.

"[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." 124 S.Ct. at 1363

...one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." 124 S.Ct. at 1363.

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. This, the law says, he shall under no circumstances be deprived of...." 124 S.Ct. at 1367.
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. 124 S.Ct. at 1374.

In this case, Petitioner was convicted primarily on the basis of the wholly un-cross-examined statements of the alleged victim. Applying the Crawford rule here would clearly reduce the "impermissibly large risk that [an] innocent [man] was convicted," and "implicate[s] the fundamental fairness of the trial." Sanchez-Cervantes, 282 F.3d at 668-669; see Dutton v. Evans, 400 U.S. 74, 89 (1970)(right of cross-examination "helps ensure the 'accuracy of the truth-determining process' [citations omitted]"); Pointer v. Texas, 380 U.S. at 405 (cross-examination is "essential and fundamental for...fair trial.").

II.

THE ISSUE RAISED IN REASON (III) OF THE PETITION SHOULD NOT BE DECIDED IN THIS CASE AS THE ISSUE WAS NEVER RAISED OR LITIGATED BELOW.

The Attorney General argues for the first time in this Petition that the decision by the Ninth Circuit "created a split among the Circuits by ruling that 28 U.S.C. §2254(d)(1) and (2) adopted the *Teague* exceptions. The Attorney General had the opportunity to make this argument in Appellee's Supplemental Brief filed pursuant to the Ninth Circuit's order after the Crawford decision and in Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. Now the Attorney General contends that the Ninth Circuit erroneously conducted a Teague retroactivity inquiry. The

Attorney General urged the Ninth Circuit on two separate occasions to conduct a Teague analysis of the retroactivity question and never made the argument which is made in the Petition for Writ of Certiorari that conducting such an inquiry would be a "misinterpretation" of the statute.

The Attorney General cites to Gosier v. Welborn, 175 F.3d 504, 510 (7th Cir. 1999) and Ramdass v. Angelone, 187 F.3d 396, 406-7 (4th Cir. 1999) for the proposition that the decision by the Ninth Circuit in this case created a split among the Circuits on this statutory construction issue. Both cases were decided before the Opinion rendered by this court in Horn v. Banks, 536 U.S. 266, 272, 122 S.Ct. 2147, 2151 (2002) which held, "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."

The Ninth Circuit conducted the analysis called for by this court, and asked for, by the Attorney General. "We ordinarily will not decide questions not raised or litigated in the lower courts." City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 259, 107 S.Ct. 1114, 1116 (1987).

CONCLUSION

Granting of Certiorari is not warranted in this case on the issue of the retroactivity of the Crawford decision to cases pending collateral review because the decision falls squarely within the holdings of this court in Teague and Schriro. The reasoning in the Crawford decision itself demonstrates that the Ninth Circuit correctly understood that this court in Crawford intended to change the "bedrock procedural elements essential to the fairness of the proceeding."

. . .

. . .

This court should not consider Petitioners third reason for the granting of Certiorari as the issue of the interpretation of the statute was not raised or litigated below.

Respectfully submitted:

By: _____
FRANNY A. FORSMAN
Federal Public Defender

CERTIFICATE OF SERVICE

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

Petitioner,

v.

MARVIN HOWARD BOCKTING,

Respondent.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 12, 2005, she served a copy of the attached Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

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Bonnie S. Box, Secretary

Supreme Court, U.S.
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APR 10 2006
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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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Espy v. Massac, Warden, No. 04-16416,
___ F. 3d ___, WL 845376 (April 3, 2006) . . 1, 2, 3

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792,
9 L.Ed. 2d 799 (1963) 3

Ohio v. Roberts,
448 U.S. 56, 100 S.Ct. 2531 (1980) 2, 3

Saffle v. Parks,
494 U.S. 484, 110 S.Ct. 1257,
108 L.Ed. 2d 415 (1990) 3

Schriro v. Summerlin,
542 U.S. 348, 124 S.Ct. 2519,
159 L.Ed. 2d 442 (2004) 3

Teague v. Lane,
489 U.S. 288, 109 S.Ct. 1060,
rehearing denied, 490 U.S. 1031,
109 S.Ct. 1771 (1989) 2, 3

White v. Illinois,
502 U.S. 346, 112 S.Ct. 736 (1992) 2, 3

Rule

Sup. Ct. R. 15(8) 1

The Petitioner above-named, Glen Whorton, Director, Nevada Department of Corrections, does hereby inform this honorable Court of a new case from the Eleventh Circuit pertinent to the resolution of the matters raised herein, pursuant to Supreme Court Rule 15(8). As a new case, it was not available at the time of the filing of the Petitioner's Petition for Writ of Certiorari.

Supreme Court Rule 15(8) governs the filing of Supplemental Briefing to inform the Court of new cases, new legislation, or other intervening matter not available at the time of the party's last filing. That Rule provides:

> Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Supreme Court Rule 15(8).

On April 3, 2006, the United States Court of Appeals for the Eleventh Circuit filed a published decision in the case Espy v. Massac, Warden, No. 04-16416, ___ F. 3d ___, WL 845376 (April 3, 2006). In that decision, the court held that this Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) did not apply retroactively under

the test announced in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, rehearing denied, 490 U.S. 1031, 109 S.Ct. 1771 (1989).

In Espy, the Eleventh Circuit held that Crawford announced a new rule:

> Under prior precedent, the recorded prior testimony of an unavailable declarant could be admitted upon a showing of sufficient indicia of reliability, even without cross-examination. *Roberts*, 448 U.S. at 65, 100 S.Ct. at 2539; *see also White*, 502 U.S. at 353-54, 112 S.Ct. at 742-43 (applying the *Roberts* requirement of sufficient indicia of reliability). *Crawford* abrogated *Roberts* and established the rule that no recorded testimonial statement can be admitted at trial unless the proponent establishes (1) that the declarant is unavailable to testify, and (2) that the defendant had a prior opportunity to cross-examine the declarant about his or her statements. *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1369. Since *Crawford* overruled the precedent that would otherwise have dictated the result in the case, it cannot be said that the result in *Crawford* was 'dictated by precedent existing at the time the defendant's conviction became final.' *See Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis in original). Thus, applying *Teague's* test, *Crawford* established a new rule.

Espy, p. 3.

Likewise, the Eleventh Circuit held that the new rule of *Crawford* did not apply retroactively:

> The standard for whether a new rule meets the second *Teague* exception is a strict one. Indeed, it is unlikely that the Supreme Court has found any new rule to fit this exception since its announcement. *See Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 2523, 159 L.Ed. 2d 442 (2004). The *Teague* Court provided only minimal guidance as to the nature of a rule that would meet the exception, but the Court has since cited the rule announced in *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.Ed. 2d 799 (1963) as one that would meet the exception were it announced today. *See Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed. 2d 415 (1990)...Clearly, the right to counsel at trial is a watershed rule that seriously improves the likelihood of an accurate conviction. Although the rule announced in *Crawford* also impacts the accuracy of criminal convictions, it does not qualify as a 'watershed' rule in the mold of *Gideon*. *Crawford* merely altered the existing regime outlined by *White*, 502 U.S. at 355-56, 112 S.Ct. at 742-43, and *Roberts*, 448 U.S. at 65, 100 S.Ct. at 2539. At least five other circuits have directly addressed this issue, and all but one have either concluded or suggested that *Crawford* does not apply retroactively...

Espy, at p. 3-4.

In Espy, therefore, the Eleventh Circuit expressly rejected the Ninth Circuit's holding in Bockting v. Bayer, 399 F.3d 1010 (*Bockting I*), and Bockting v. Bayer, 408 F.3d 1127 (*Bockting II*), *rehearing en banc denied*, Bockting v. Bayer, 418 F.3d 1055 (9th Cir. 2005), and joined the majority of Circuit Courts holding that Crawford does not apply retroactively.

Petitioners, therefore, inform the Court of the new authority from the Court of Appeals for the Eleventh Circuit that bears upon the issues presented in the Petition for Writ of Certiorari.

Respectfully Submitted,

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS, Petitioner

v.

MARVIN HOWARD BOCKTING, Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
411 E. Bonneville Avenue, #250
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Counsel for Respondent

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FEDERAL RULES

Supreme Court Rule 15.8 1

Respondent Marvin Howard Bockting files this supplemental brief pursuant to Supreme Court Rule 15.8. The Petition for Certiorari filed by the Nevada Department of Corrections is pending and this brief is filed to call attention to an Opinion of the Sixth Circuit Court of Appeals filed April 18, 2006 which was not available at the time of the filing of Respondent's Opposition to the Petition for Certiorari.

The issue before this court pending certiorari is whether this court's decision in Crawford v. Washington, 541 U.S. 36 (2004) should be applied retroactively to cases on collateral review. The Ninth Circuit in Petitioner's case applied the rule in Crawford retroactively to petitioner's case which was before that court on collateral review.

On April 10, 2006, Petitioner-Nevada Department of Corrections filed a Supplemental Brief calling this court's attention to an Eleventh Circuit decision decided April 3, 2006-Espy v. Massac, No. 04-16416, 2006 WL 845376 (11th Cir., April 3, 2006). Espy cites to the decisions of five Circuits which have "either concluded or suggested that *Crawford* does not apply retroactively." Id.

On April 18, 2006, the Sixth Circuit decided Fulcher v. Motley, No. 03-6216, 2006 WL 996615 (6th Cir., April 18, 2006). While the majority opinion decides the issue based upon pre-Crawford law, and therefore does not reach the issue of retroactivity, language in the majority opinion and the Concurring opinion undermine the validity of any reliance on a prior decision of the Sixth Circuit, Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005); the Concurring Opinion addresses the weaknesses of the decisions of the Second, Seventh, and Tenth Circuits and agrees with the Ninth Circuit in this case.

THE CRAWFORD ANALYSIS IN DORCHY MAY NOT BE BINDING

The Concurring Opinion in Fulcher described the Dorchy determination of non-retroactivity, a "drive-by holding" meriting no precedential value, citing to Justice Scalia's language in Steel Co. V. Citizens for a Better Env't, 523 U.S. 83, 91 (1998). The majority opinion admits that while Dorchy rejected the argument that Crawford announced a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," that conclusion was reached "without substantial analysis." The majority opinion, although not reaching the retroactivity question, suggests that the question is not settled in that circuit:

> Given our decision to order that the writ be granted on the basis of pre-*Crawford* law, we find it unnecessary to address whether *Crawford* announced a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," or Judge Clay's concern that the analysis in *Dorchy* was insufficiently thorough to bind later panels of this court. Fulcher, Supra at *17.

THE DECISIONS OF THE SECOND, SEVENTH AND TENTH CIRCUITS CALLED INTO QUESTION

Judge Clay, in his Concurring Opinion in Fulcher, analyzes the decisions of the Second[1], Seventh[2] and Tenth[3] Circuits. He termed the decisions of the Second and Seventh Circuits as "critically flawed:"

> Both Circuits dispute the presumption inherent in the Constitution itself. As Justice Scalia noted, the Confrontation Clause *demands* that the reliability of a statement be determined via confrontation, and not by any independent judicial determination. Fulcher, Supra at *27

---

1 Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004)

2 Murillo v. Frank, 402 F.3d 786, 790-791 (7th Cir. 2005)

3 Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004)

Judge Clay noted that the decision of the Tenth Circuit did not reach the merits of the retroactivity doctrine, determining that retroactivity was precluded by the AEDPA.

The Eleventh Circuit decision in Espy suffers from the same inadequacy of analysis that Judge Clay termed a "drive by holding."

CRAWFORD IS MORE LIKE ROBERTS[4] AND BERGER[5] THAN SCHRIRO[6]

Finally, the Concurring Opinion in Fulcher conducted an in-depth analysis of pre-Teague and post-Teague retroactivity decisions. He concluded that,

> In the decade and a half since *Teague*, the Supreme Court has yet to be confronted with a rule akin to those presented to the Court in *Gideon, Robinson, Witherspoon, Bruton and Berger*. Rather, the Court has been asked to rule on sentencing issues which invoke either Eighth Amendment rights in the context of capital cases or the division between judge and jury in fact-finding. The Court's refusal to apply these types of new rules retroactively is consistent with its pre-Teague practice. In contrast, the rule presented in Crawford is much more analogous to those pre-Teague cases (Gideon, Robinson, Witherspoon, Bruton, and Berger) which the Court found articulated new rules meriting retroactive application. A holding that Crawford articulates a watershed rule in criminal procedure is entirely consistent with the Supreme Court's historical retroactivity jurisprudence. Fulcher, Supra at *23.

....

....

....

---

[4] Roberts v. Russell, 392 U.S. 293 (1968)(retroactivity applied to rule precluding admissibility of co-defendant's confession implicating defendant absent cross-examination)

[5] Berger v. California, 393 U.S. 314 (1969)(retroactivity applied to rule precluding prehearing testimony in lieu of live testimony absent showing of good faith effort to secure witness).

[6] Schriro v. Summerlin, 542 U.S. 348 (2004)(rule requiring capital sentencing by juries not retroactive).

The only in-depth analysis provided to this court is that performed by the Ninth Circuit in this case and by Judge Clay in his concurring opinion in Fulcher.

Respectfully submitted:

By:
FRANNY A. FORSMAN
Federal Public Defender

CERTIFICATE OF SERVICE

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS.
Petitioner,

v.

MARVIN HOWARD BOCKTING,

Respondent.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 3, 2006, she served a copy of the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by personally placing a copy in the United States mail, postage paid to the addresses named below:

George J. Chanos
Attorney General of the State of Nevada
Chief Deputy Attorney General
Mr. Gerald J. Gardner
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Las Vegas, NV 89101

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Bonnie S. Box, Secretary

No. 05-595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS

Petitioner

v.

MARVIN HOWARD BOCKTING
Respondent

APPENDIX

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Fulcher v. Motley, No. 03-6216. 2006 WL 996615 (6th Cir., April 18. 2006). 1

--- F.3d ----, 2006 WL 996615 (C.A.6 (Ky.)), 2006 Fed.App. 0138P
(Cite as: --- F.3d ----)

Briefs and Other Related Documents
2006 FED. App. 0138P

United States Court of Appeals,Sixth Circuit.

Elem Ray FULCHER, Petitioner-Appellant.

v.

John MOTLEY, Warden, Respondent-Appellee.

No. 03-6216.

Argued: Dec. 2, 2005.
Decided and Filed: April 18, 2006.

Background: State prisoner petitioned for writ of habeas corpus after his conviction on charges of murder, burglary, and robbery had been affirmed on appeal. The United States District Court for the Western District of Kentucky, Charles R. Simpson III, J., denied petition. Prisoner appealed and requested certificate of appealability (COA).

Holdings: The Court of Appeals, Cook, Circuit Judge, held that:

1(1) prisoner preserved his argument for federal habeas review;

5(2) prisoner could not be prevented under invited error doctrine from re-arguing constitutional claim;

7(3) de novo review applied on federal habeas review to prisoner's claim;

10(4) particularized guarantees of trustworthiness did not support admission of pre-trial statements of woman who became wife of prisoner prior to trial; and

16(5) admission at trial of pre-trial statements of woman who became wife of prisoner before trial, over defendant's assertion of marital privilege, in violation of confrontation clause, was not harmless error.

Reversed and remanded.

Clay, Circuit Judge, filed concurring opinion.

[1] Habeas Corpus 197 ⇐383

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380 Sufficiency of Presentation; Fair Presentation
197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue. Most Cited Cases

State prisoner preserved his argument for federal habeas review, that Confrontation Clause prevented admission of pre-trial statements of woman who became his wife prior to trial, over prisoner's assertion of marital privilege, despite prior citation to wrong cases in support of his constitutional claim, where prisoner asserted that admission of those statements violated his rights under Confrontation Clause in terms that were sufficiently particular to allege denial of specific constitutional right. U.S.C.A. Const.Amend. 6; KRS 421.210(1).

[2] Criminal Law 110 ⇐417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Kentucky courts considering the admissibility of hearsay statements against penal interest must

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examine: (1) the time of the declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is against the declarant's penal interest; and (4) the availability of a declarant as a witness.

[3] Habeas Corpus 197 ⇐383

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380 Sufficiency of Presentation; Fair Presentation
197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue. Most Cited Cases
Citation to cases that employ a federal constitutional analysis is not required to prevent waiver on federal habeas review where the petitioner has phrased his claim in terms of a denial of a specific constitutional right.

[4] Criminal Law 110 ⇐1137(2)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1135 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(2) k. Error Committed or Invited by Party Complaining In General. Most Cited Cases
The invited error doctrine applies only where a defendant affirmatively seeks a ruling from a trial court and then later asserts that the ruling he requested was erroneous.

[5] Habeas Corpus 197 ⇐383

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380 Sufficiency of Presentation; Fair Presentation
197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue. Most Cited Cases
State prisoner could not be prevented under invited error doctrine from re-arguing constitutional claim on federal habeas review that he previously argued incorrectly in state court proceedings by citing to wrong precedent.

[6] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases
Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts; a state-court decision will be contrary to the Supreme Court's clearly established precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases. 28 U.S.C.A. § 2254(d)(1).

[7] Habeas Corpus 197 ⇐770

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 k. Particular Issues and Problems. Most Cited Cases
De novo review applied on federal habeas review to petitioner's claim that Confrontation Clause prevented admission of pre-trial statements at trial of woman who became his wife prior to trial, over his assertion of marital privilege, where custodial confessions of accomplices that inculpated criminal

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defendants were not admissible under firmly rooted hearsay exception according to clearly established law at time of petitioner's direct appeal and state appellate court's application of four-factor test of trustworthiness was contrary to reasoning and result that federal law required. U.S.C.A. Const.Amend. 6 ; 28 U.S.C.A. § 2254(d)(1); KRS 421.210(1).

[8] Criminal Law 110 ⇐419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1) k. In General. Most Cited Cases

A prosecutor's later decision to try a declarant does not affect whether the declarant's statements possessed sufficient "indicia of reliability" at the time they were made; the test of whether such indicia exist references only the substance and circumstances of the hearsay statement's declaration.

[9] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases

State appellate court's failure to cite applicable precedent in its opinion was not relevant to issue on federal habeas review of whether its decision was contrary to federal law, provided that court's reasoning or result did not contradict that precedent.

[10] Criminal Law 110 ⇐662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Particularized guarantees of trustworthiness did not support admission of pre-trial statements of woman who became wife of defendant prior to trial, for purpose of defendant's claim under confrontation clause, where statements were made while in police custody, during interrogation, and in response to leading questions asked by police officers who were suspicious of her wrongdoing, and statements inculpated defendant and limited woman's involvement with the crimes. U.S.C.A. Const.Amend. 6.

[11] Habeas Corpus 197 ⇐447

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k447 k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. Most Cited Cases

Constitutional error is cause for federal habeas relief only if it has a substantial and injurious effect or influence in determining the jury's verdict.

[12] Criminal Law 110 ⇐1168(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1168 Rulings as to Evidence in General
110k1168(2) k. Reception of Evidence. Most Cited Cases

When determining whether Confrontation Clause error is harmless, a reviewing court should consider the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and the overall strength of the prosecution's case. U.S.C.A. Const.Amend. 6.

[13] Habeas Corpus 197 ⇐447

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k447 k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. Most Cited Cases

When a federal judge in a habeas proceeding is in

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grave doubt about whether trial error of federal constitutional law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless.

[14] Habeas Corpus 197 ⇐442

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k442 k. Errors or Irregularities; Prejudice. Most Cited Cases
In a federal habeas proceeding, a court may consider corroborating evidence to determine whether the error was harmless.

[15] Habeas Corpus 197 ⇐705.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)2 Evidence
197k705 Burden of Proof
197k705.1 k. In General. Most Cited Cases
In a federal habeas proceeding, neither side has the "burden" of proving that the error was harmless.

[16] Habeas Corpus 197 ⇐481

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k481 k. Conduct of Trial, in General. Most Cited Cases
Admission at trial of pre-trial statements of woman who became wife of petitioner before trial, over petitioner's assertion of marital privilege, in violation of confrontation clause, was not harmless error, and thus warranted habeas relief, where statements bolstered only direct account of petitioner's involvement in crime and connected only physical evidence to him. U.S.C.A. Const.Amend. 6; KRS 421.210(1).

[17] Criminal Law 110 ⇐1169.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(1) k. Evidence in General. Most Cited Cases

Criminal Law 110 ⇐1169.2(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(1) k. In General. Most Cited Cases
When determining whether the trial court's error was harmless, the Court of Appeals examines the following factors: (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case.

ARGUED: Chad A. Readler, Jones Day, Columbus, Ohio, for Appellant. Ian G. Sonego, Office of the Attorney General, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Chad A. Readler, Marc A. Fulkert, Jones Day, Columbus, Ohio, for Appellant. Ian G. Sonego, Office of the Attorney General, Frankfort, Kentucky, for Appellee. Gerald L. Gulley, Jr., Gulley Oldham, PLLC, Knoxville, Tennessee, for Amicus Curiae.

Before: CLAY and COOK, Circuit Judges; OLIVER, District Judge.
COOK, J., delivered the opinion of the court, in which OLIVER, D. J., joined.
CLAY, J. (pp. ---- - ----), delivered a separate concurring opinion.

OPINION

COOK, Circuit Judge.
*1 Elem Ray Fulcher, currently serving a life

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sentence for murder, burglary, and robbery, appeals the denial of his petition for a writ of habeas corpus. The evidence against Fulcher included statements from a police station interview with his then girlfriend, Patricia Sue Ash, taped soon after the crime. The couple later married; Ash invoked marital privilege under Kentucky law and was thus unavailable for cross-examination at Fulcher's trial. Fulcher contends that the admission of Ash's statements violated his rights under the Sixth Amendment's Confrontation Clause, according to both the clearly established law at the time and the later case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which he argues should apply retroactively. We find that the admission of Ash's statements did violate Fulcher's clearly established rights and that the error was not harmless. We thus **REVERSE** and **REMAND** to the district court for entry of the writ.

I. Factual and Procedural Background

A. Factual History

On December 22, 1991, Charlie Bramer was found beaten and stabbed to death in his home in Jefferson County, Kentucky. In April 1994, Fulcher was convicted of burglary, robbery, and Bramer's murder. The prosecution's case substantially consisted of the testimony of Terry Wright, Fulcher's friend and alleged accomplice, the police interview with Ash, the testimony of two inmates to whom Fulcher admitted committing the murder, and the testimony of a third inmate, to whom Fulcher offered $500 to provide an alibi. No murder weapon was found, and Fulcher's fingerprints were not discovered at the crime scene.

Wright's testimony supplied the bulk of the facts. He and Fulcher were drinking and watching football at Fulcher's house on the day of the crime. The two then went for a drive and decided to go to the home of Charlie Bramer to steal some money. They entered the home while Bramer lay asleep on the couch; Wright watched Bramer, and Fulcher searched the bedroom. Wright then heard a car come down the driveway. He went to the front door to look out and accidently hit the security chain on the door, waking Bramer. Wright ran out, taking the front door key with him, and got into Fulcher's car. Fulcher joined him. Bramer came out, walked over to the car, reached inside, and smacked Fulcher on the head.

Fulcher asked Bramer if he could talk to him for a minute, and the two walked back into the house. Wright initially stayed in the car but then went inside to find Fulcher hitting Bramer in the head with a hammer. Wright testified that there was nothing he could do to stop Fulcher. Wright again ran out, wiped his fingerprints off of the front door, and returned to the car. Three or four minutes later, Fulcher returned covered in blood. He told Wright, " This makes us tighter than anybody," and then drove Wright home. Fulcher told Wright that he killed Bramer because Bramer would otherwise have been able to identify them.

On January 2, 1992, Patricia Sue Ash was pulled over in a car matching the description of Fulcher's vehicle. The police took her to the station for questioning, at which point she provided the taped interview that lies at the heart of this appeal. Ash stated in the interview that sometime before Christmas Fulcher asked her to wash a pair of grey sweatpants that had blood on them-the result, Fulcher said, of a fight in which he and Wright had been involved. She stated that later Wright asked her to dispose of a key that she did not think belonged to her, Wright, or Fulcher. Ash could not recall whether Fulcher was present for the discussion, but Wright later testified that he was. Ash admitted that she threw the key into a sewer, where it was recovered by the police.

*2 William Mucker and Nick Mantilli, state inmates, testified that Fulcher admitted to each of them that he killed Bramer. In addition, Mucker, who had known Fulcher before the murder and who was an inmate with Fulcher, testified that Fulcher told him to see him after Mucker's release. Fulcher would then tell Mucker where the murder weapons were located, and Mucker would dispose of them. Another inmate, Norman Lewis, testified that Fulcher offered him $500 to provide an alibi.

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B. Litigation History

Basic Procedural History. Fulcher was convicted of murder, first degree robbery, and first degree burglary. He directly appealed his conviction to the Kentucky Supreme Court, arguing that (1) the trial court denied him a fair trial by not granting a mistrial after Wright volunteered from the stand that he had taken a polygraph test; (2) the trial court denied him due process by failing to instruct the jury on lesser offenses, including manslaughter, second degree burglary, and theft by unlawful taking; and (3) the trial court denied him a fair trial and violated his Sixth Amendment right to confront witnesses by admitting Ash's tape-recorded statements.

The Kentucky Supreme Court rejected all of Fulcher's arguments on the merits. The court affirmed the conviction on June 20, 1996, and it denied his petition for rehearing on August 26. On August 15, 1997, Fulcher moved in the state trial court to vacate his sentence pursuant to Kentucky Rule of Criminal Procedure 11.42, alleging various instances of ineffective assistance of counsel. The trial court denied the motion, and on May 25, 2001, the Kentucky Court of Appeals affirmed the denial. Fulcher then petitioned the Court of Appeals for a rehearing. The Court of Appeals denied his petition on August 10, 2001. A year later, on August 14, 2002, the Kentucky Supreme Court denied his motion for discretionary review of the Court of Appeals's decision. On November 7, 2002, he filed this petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky.

Fulcher raised the same three arguments in his habeas petition as he had on direct review: lack of a fair trial stemming from Wright's "lie detector" statement; lack of a fair trial and due process violations from failure to instruct the jury on the lesser offenses; and, most relevant to this appeal, lack of a fair trial and violation of his Sixth Amendment confrontation right by the admission of Ash's statements. A federal magistrate judge recommended denying Fulcher's petition. He found that although Fulcher had preserved his Sixth Amendment challenge, habeas relief was inappropriate because the Kentucky Supreme Court's decision was neither "clearly contrary to" nor "an unreasonable application of" the United States Supreme Court precedent in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The district court accepted the magistrate's recommendations, dismissed Fulcher's petition, and denied his request for a certificate of appealability.

*3 On September 3, 2003, Fulcher filed his notice of appeal, followed by a request for a certificate of appealability from this court. On August 19, 2004, this court granted Fulcher the certificate "regarding the issue of whether his rights under the Confrontation Clause were violated when a tape-recorded statement was admitted into evidence."

[1] *Preservation of his Sixth Amendment Argument.* Because Kentucky contends that Fulcher has waived the Confrontation Clause challenge he raises in this appeal, we consider his filings with respect to the issue.

[2] Prior to trial, Fulcher filed a motion in limine to exclude Ash's statements, arguing, among other things, that their admission would violate his Confrontation Clause right as defined by *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (holding that the Sixth Amendment requires that hearsay statements have "indicia of reliability"-*i.e.*, either fall into a "firmly rooted hearsay exception" or have "particularized guarantees of trustworthiness"), *Lee v. Illinois*, 476 U.S. 530, 541, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (holding that inculpatory hearsay statements by accomplices are "presumptively unreliable"), and *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (holding that to have "particularized guarantees of trustworthiness," hearsay evidence "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial"). Fulcher also cited the Kentucky case of *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky.1990), which allowed an unavailable party's confession to be admitted against his alleged accomplice, for the proposition that a non-testifying codefendants's

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confession is presumptively unreliable. As discussed below, the more relevant holding in *Taylor* was that statements against penal interest may only be admitted based upon a four-factor test of trustworthiness. Fulcher did not cite that test in his motion.

Next, as recounted in his brief on direct appeal before the Kentucky Supreme Court (J.A. 54), Fulcher objected to the admission of Ash's statements before and throughout the trial. The brief offers few specifics as to the content of those objections, other than noting that the pretrial objection was "overruled by the trial court as to ... whether or not the statement qualified as being one against Ms. Ash's penal interest."

The section of the brief recounting these pretrial and trial objections was entitled, "THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM UNDER THE SIXTH AMENDMENT ... WHEN IT ALLOWED, OVER APPELLANT'S OBJECTION, THE ADMISSION OF THE HEARSAY STATEMENT OF PATRICIA SUE ASH FULCHER." (J.A. 54.) In that section, Fulcher set out the facts underlying his Sixth Amendment challenge: During a police interrogation, Ash gave a statement that was later admitted at trial; Ash did not testify at trial, and she was never subjected to cross-examination. In the brief, Fulcher did not expressly address *Roberts, Lee*, or *Wright*. Instead he argued that the trial court erred by failing to apply *Taylor*'s four-factor test to Ash's statements. (J.A. 60-61.)

*4 In his habeas petition, Fulcher asserted that " Petitioner suffered substantial prejudice that deprived Petitioner of a fair trial and his right to confrontation under the Sixth Amendment ... when the trial court allowed over Petitioner['s] objection, the admission of the hearsay statement of Patricia Sue Ash Fulcher." (J.A. 15.) The petition offered no further detail.

Then, in his objections to the magistrate's report, Fulcher argued for the first time that *Taylor*, which he himself had several times cited, was the wrong legal standard to apply to his case-and specifically that the magistrate's report, because it relied on *Taylor*, was contrary to the clearly established federal law in *Roberts, Lee, Wright, Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), and *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Fulcher also argued, though less emphatically, that Ash's statements did not "meet the high standard for admissibility as outlined in *Chambers v. Mississippi*." (J.A. 232.)

Fulcher's brief in this appeal focuses squarely on the inconsistency of the proceedings below with Sixth Amendment Confrontation Clause jurisprudence-under both *Crawford* and pre-*Crawford* case law.

II. Analysis

A. Fulcher Did Not Waive His Sixth Amendment Arguments as to Either *Crawford* or its Predecessors

Kentucky contends that Fulcher waived his current Confrontation Clause arguments because on direct appeal he failed to "[argue] that the *Taylor* case was incorrectly decided or applied an erroneous constitutional standard." (Appellee's Br. 23.) Indeed, "[t]he only two cases that Fulcher asked the Kentucky Supreme Court to apply on direct appeal were [*Chambers*] and [*Taylor*]." (*Id.*) Kentucky contends accordingly that "[the court] cannot be faulted for applying the very precedents that Fulcher asked it to apply to his case" (emphasis removed) and moreover that "habeas relief is not available when the petitioner or his counsel invited the error about which he complains." (Appellee's Br. 24 (citing *Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir.1998); *Fields v. Bagley*, 275 F.3d 478, 485 (6th Cir.2001) (citation omitted)).) Kentucky also contends that Fulcher has waived his current Confrontation Clause arguments because his objections to the magistrate's report argued that *Chambers* did apply to his case, but was misapplied by the Kentucky Supreme Court. (Appellee's Br.

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24.)

1. Waiver Standard

Newton v. Million, 349 F.3d 873, 877 (6th Cir.2003) , provides a thorough account of the Sixth Circuit requirements for preserving constitutional claims:
Federal courts do not have jurisdiction to consider a claim in a habeas petition that was not "fairly presented" to the state courts. A claim may only be considered "fairly presented" if the petitioner asserted both a factual and legal basis for his claim in state court. Although general allegations of the denial of a "fair trial" or "due process" have been held insufficient to "fairly present" federal constitutional claims, a petitioner need not recite " book and verse on the federal constitution."
*5 A petitioner can take four actions in his brief which are significant to the determination as to whether a claim has been fairly presented: "(1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law."

(Citations omitted.) Finding that Newton's brief " provided a detailed recitation of the facts and specifically stated that the trial court's refusal to instruct the jury on the issue of self-protection against multiple aggressors 'violated [his] right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution,' " *id.* (citation omitted), the court found his constitutional arguments preserved.

2. As Applied to the Facts Here

[3] Fulcher did not waive his Confrontation Clause arguments because at every stage of the process, he took some combination of the four actions discussed in *Newton*. In each of his briefs Fulcher asserted that the admission of Ash's statements violated his rights under the Confrontation Clause-" terms sufficiently particular to allege a denial of a specific constitutional right." *Id.* And each " alleg[ed] facts well within the mainstream of constitutional law," *id.*, specifically, that Ash's out-of-court statements were asserted for their truth, and that she was unavailable for cross-examination. That he cited the wrong cases in support of his constitutional claim is no basis for default. Since " [t]here is *no* requirement that the petitioner cite to cases that employ federal constitutional analysis where he has phrased his claim in terms of a denial of a specific constitutional right," *Newton*, 349 F.3d at 877 (emphasis added), penalizing a party for citing the wrong cases would create the perverse incentive to cite no cases at all. *Cf. Carter v. Bell*, 218 F.3d 581, 606 (6th Cir.2000) ("We do not require word-for-word replication of the state claim in the habeas corpus petition in order to address the merits therein, only that the petitioner 'fairly present ' the substance of each of his federal constitutional claims to the state courts.").

[4][5] As for the "invited error doctrine," Fulcher's reply brief correctly notes that "the invited error doctrine applies only where a defendant affirmatively seeks a ruling from a trial court and then later asserts that the ruling he requested was erroneous." (Reply Br. 8.) *See United States v. Sharpe*, 996 F.2d 125, 129-30 (6th Cir.1993) (defendant, having convinced the court that he was not guilty under one statute, was barred from later arguing that a second statute could not apply to his conduct because the first one already did); *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 60 (6th Cir.1991) (plaintiff, after requesting a jury verdict, was barred from asserting the impropriety of that verdict); *All Am. Life and Casu. Co. v. Oceanic Trade Alliance Council Int'l, Inc.*, 756 F.2d 474, 479-80 (6th Cir.1985) (refusing to exclude otherwise inadmissible evidence because the plaintiff had "invited" witnesses to make the references it later sought to exclude); *see also Fields*, 275 F.3d at 485 (finding no invited error where respondent charged that petitioner's counsel had intentionally left petitioner without appellate counsel so as to create a basis for reversal by the Supreme Court); *Leverett v. Spears*, 877 F.2d 921, 924 (11th Cir.1989) (petitioner may not allege fundamental error in jury instructions he himself argued for and submitted). Kentucky points to no

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use of the "invited error" doctrine to prevent a plaintiff from re-arguing a constitutional claim that he previously argued *incorrectly* by citing the wrong precedent.

*6 We thus find that Fulcher has preserved his argument that the admission of Ash's statements violated his Confrontation Clause rights.

B. The Kentucky Supreme Court's Decision Violated Clearly Established Federal Law

1. Habeas Standard

[6] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may only grant a prisoner's petition for a writ of habeas corpus if it finds that the state court's adjudication " resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). And "[a] state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court *applies a rule* that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405, 120 S.Ct. 1495 (emphasis added). For example, a habeas petition could be granted if, in spite of the rule in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)-that a petitioner urging ineffective assistance of counsel need only show a " reasonable probability" of prejudice-a state court required the petitioner to show prejudice by a preponderance of the evidence. *Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495. When a state court commits such an error, "a federal court [is] unconstrained by § 2254(d)(1)," *id.* at 406, 120 S.Ct. 1495, and de novo review is appropriate. *See Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir.2001).

2. The Kentucky Supreme Court's Decisional Rule Was Contrary to Clearly Established Federal Law. Therefore De Novo Review Is Appropriate

[7] *The Clearly Established Law.* The Confrontation Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. At the time of the Kentucky Supreme Court's ruling in 1996, Confrontation Clause challenges were analyzed according to the rule in *Ohio v. Roberts*-that hearsay statements by unavailable declarants were only admissible if they bore "adequate indicia of reliability," by either 1) "fall[ing] within a firmly rooted hearsay exception," or 2) possessing " particularized guarantees of trustworthiness." 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) . As for the first possibility, the Supreme Court " [had] recognized that statements admitted under a ' firmly rooted' hearsay exception [were of a sort] so trustworthy that adversarial testing would add little to their reliability," *Idaho v. Wright*, 497 U.S. 805, 820-21, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). For example, dying declarations were declared admissible by the 1895 case of *Mattox v. United States*-notwithstanding the obvious Confrontation Clause problems-because "the sense of impending death [was] presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409. As for the second possibility, statements bearing " particularized guarantees of trustworthiness," such statements had to be "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *Wright*, 497 U.S. at 821, 110 S.Ct. 3139; and in assessing that reliability, courts were forbidden to consider corroborating evidence. *Id.* at 822, 110 S.Ct. 3139 (rejecting the "contention that evidence corroborating the truth of a hearsay statement [could] properly support a finding that the statement bears 'particularized guarantees of trustworthiness' "). Instead, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to

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convict a defendant [had to] possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.*

*7 By the time of Fulcher's direct appeal, the Supreme Court had several times examined the hearsay exception for statements against penal interest. In *Lilly v. Virginia*, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), a case following Fulcher's direct appeal, the court identified three situations in which declarations against penal interest were offered into evidence: " (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims the *declarant* committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." *Id.* at 127, 119 S.Ct. 1887. We discuss each category in turn, and on the basis of *Hill v. Hofbauer*, 337 F.3d 706 (6th Cir.2003) (discussed below), we hold first that " accomplices' confessions that inculpate a defendant, " *Lilly*, 527 U.S. at 134, 119 S.Ct. 1887, were not admissible under a firmly rooted hearsay exception according to the clearly established law at the time of Fulcher's direct appeal.

The court in *Lilly* noted that statements in the first category, "voluntary admissions against the declarant," "carr[ied] a distinguished heritage confirming their admissibility." *Id.* at 127, 119 S.Ct. 1887 (citations omitted). But when the admission of such statements risked inculpating another person (such that they would border on the third category), they had been held inadmissible. *Id.* at 128, 119 S.Ct. 1887 ("[W]e have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."); *see Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (ordering a new trial even after the jury had been instructed to consider one codefendant's confession as evidence only against him, and not against the other codefendant); *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (" Where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand."); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) (applying *Bruton* to bar the admission of a non-testifying codefendant's confession even after the name of the other defendant had been redacted from it). According to the court in *Lilly*, the logic of such decisions was that "because the use of an accomplice's confession 'creates a special, and vital, need for cross-examination,' a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession." 527 U.S. at 128, 119 S.Ct. 1887 (quoting *Gray*, 523 U.S. at 194-95, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998)).

Statements in the second category, which were inculpatory to the declarant but exculpatory to the defendant, raised different constitutional concerns. Because they were offered by the accused, their admission did not implicate Confrontation Clause concerns; rather, their *exclusion* threatened *Due Process* protections. This was the message of *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), which held that the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against (their own) penal interest when the statements were made under circumstances that " provided considerable assurance of their reliability." *Id.* at 300, 93 S.Ct. 1038. The Kentucky Supreme Court in the *Taylor* case read *Chambers* to require that hearsay statements against penal interest be measured according to four factors: "(1) The time of the declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is against the declarant's penal interest; and (4) the availability of a declarant as a witness." 821 S.W.2d at 74. But note the substantial difference in how the tests were applied: The test was created in *Chambers* to cabin the protections afforded to defendants by the Due Process Clause (due process prevents hearsay rules from barring the introduction of certain *very reliable* exculpatory confessions); it was applied by Kentucky in *Taylor* to allow the prosecution to offer inculpatory statements (category *three*) that the Kentucky court believed sufficiently reliable to not offend the Confrontation Clause. *See Taylor*, 821 S.W.2d at 75-76.

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*8 The third category included cases, like Fulcher's (and Lilly's), where the government sought to introduce "a confession by an accomplice which incriminate[d] a criminal defendant." *Lee v. Illinois*, 476 U.S. 530, 544 n. 5, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). The court in *Lilly* first cited *Lee* 's holding that such statements were "presumptively unreliable." 527 U.S. at 131, 119 S.Ct. 1887 (" [O]ver the years ..., the Court has 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.' ") (quoting *Lee*, 476 U.S. at 541, 106 S.Ct. 2056). *Lee* did not explicitly hold that such statements were not within a "firmly rooted hearsay exception," but it implied as much by noting that inculpatory statements by unavailable accomplices had been excluded in *Bruton* and *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and by proceeding to examine the statements for "particularized guarantees of trustworthiness."
In *Roberts*, we recognized that *even if certain hearsay evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable* and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." *Ibid* [448 U.S. at 66, 100 S.Ct. 2531, 65 L.Ed.2d 597].... Illinois' asserted grounds for holding Thomas' statement to be reliable with respect to Lee's culpability simply do not meet this standard.

Lee, 476 U.S. at 543-44, 106 S.Ct. 2056 (emphasis added). As the court in *Lilly* noted, it would have been unnecessary for the court in *Lee* to seek such " particularized guarantees of trustworthiness" if the statements fell within a "firmly rooted hearsay exception."Our holdings in *Bruton* [,] ... *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), *Gray v. Maryland*, ... and *Lee v. Illinois* ... were all premised, explicitly or implicitly, on the principle that accomplice confessions that inculpate a criminal defendant are not *per se* admissible (and thus necessarily fall outside a firmly rooted hearsay exception), no matter how much those statements also incriminate the accomplice.

527 U.S. at 134 n. 5, 119 S.Ct. 1887. The court in *Lilly* thus cast the holding most relevant to Fulcher's case as follows: "The decisive fact, *which we make explicit today*, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." 527 U.S. at 134, 119 S.Ct. 1887 (emphasis added).

We held in *Hill v. Hofbauer*, 337 F.3d at 717, that *Lilly* did not announce a "new rule" of criminal procedure, and thus could apply to cases on collateral review without regard to § 2254(d)(1). *See Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (holding that in habeas cases, a subsequently decided case does not present new law if it is "dictated by precedent existing at the time the defendant's conviction became final"). In other words, we held that what was clearly established by *Lilly* was, in fact, clearly established *before Lilly*: "*Douglas*, *Bruton*, and *Lee* evidence that the Supreme Court had clearly established the principle that a co-defendant's custodial confessions are unreliable and not within a 'firmly rooted' hearsay exception prior to *Lilly*." *Hill*, 337 F.3d at 717. Because *Douglas* (1965), *Bruton* (1968), and *Lee* (1986) all pre-date the 1996 conclusion of Fulcher's direct appeal, the principle was clearly established by that point as well.

*9 Kentucky disagrees, arguing on the basis of *Neuman v. Rivers*, 125 F.3d 315 (6th Cir.1997), and *Gilliam v. Mitchell*, 179 F.3d 990 (6th Cir.1999) (applying *Neuman* retroactively to 1994 conduct), that by the end of Fulcher's direct appeal it was clearly established that Ash's statement *did* fall into a firmly rooted hearsay exception-specifically, the hearsay exception in Fed. R. Evid. 804(b)(3) for statements against penal interest. But in *Hill* we distinguished both of these cases. We said that unlike the contested statements in *Hill*, which inculpated the defendant (as Ash's do here), "the admitted statement [in *Neuman*] did not inculpate the declarant's accomplice, but only spoke to the declarant's role in the crime." 337 F.3d at 717 n. 5; *see United States v. Franklin*, 415 F.3d 537, 547 (6th Cir.2005) (rejecting the government's argument that the statement against penal interest exception

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was firmly rooted in the Sixth Circuit because "in *Neuman*-the one case where this Court suggested as much-the statements at issue were made by the defendant and inculpated only himself"). And we noted that "[in *Gilliam,*] we gave only a cursory review of the 'firmly rooted' exception issue, and rested our holding alternatively on two other grounds [*i.e.*, the presence of 'particularlized guarantees of trustworthiness' and harmless error]." *Hill*, 337 F.3d at 717 n. 5; *see Gilliam*, 179 F.3d at 994 n. 1 (expressly avoiding *Neuman* 's holding because the Supreme Court had recently heard oral arguments in *Lilly*). Thus neither *Neuman* nor *Gilliam* stand in the way of *Hill* 's holding that after *Lee* (1986) (the latest case we considered necessary to *Lilly* 's holding), it was clearly established that there was no firmly rooted hearsay exception for " accomplices' confessions that inculpate a criminal defendant." *Lilly*, 527 U.S. at 134, 119 S.Ct. 1887.

[8] Nor does it matter that *Hill* concerned statements by a declarant who was later tried for the crime to which he confessed, either as a codefendant in a consolidated trial (as in *Hill*), or as a sole defendant in a separate trial (as in *Lilly*). A prosecutor's later decision to try a declarant does not affect whether the declarant's statements possessed sufficient "indicia of reliability" at the time they were made. The test of whether such indicia exist references only the substance and circumstances of the hearsay statement's declaration:
[The] standard [for determining whether a hearsay exception is firmly rooted] is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time "*to remove all temptation to falsehood*, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial.

Lilly, 527 U.S. at 126, 119 S.Ct. 1887 (quoting *Mattox*, 156 U.S. at 244, 15 S.Ct. 337) (emphasis added). The logic of *Lilly* 's holding is simply that because "an accomplice's statements that shift or spread the blame to a criminal defendant" may evidence such a temptation for falsehood, they cannot fall within a firmly rooted hearsay exception. *Lilly*, 527 U.S. at 133, 119 S.Ct. 1887 (quoted in *Hill*, 337 F.3d at 713-14).

*10 Having considered the clearly established law with respect to *Roberts* 's "firmly rooted" category, we now address the clearly established law at the time of Fulcher's direct appeal regarding certain features of the "particularized guarantees of trustworthiness" inquiry. First, as noted above, *Wright* prohibited courts from considering corroborating evidence when seeking such " guarantees." Second, *Lee* guided courts to question the reliability of confessions elicited by custodial police interrogation, given the incentives that declarants in such circumstances face:
Although ... the confession was ... voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders.

Lee, 476 U.S. at 544, 106 S.Ct. 2056. Because of the presence of such incentives, the court in *Lee* held that the custodial statements in that case were not supported by "particularized guarantees of trustworthiness." Moreover, as *Lilly* would later note,[T]he historical underpinnings of the Confrontation Clause and the sweep of our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice-that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

527 U.S. at 137, 119 S.Ct. 1887. Similarly, *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) (interpreting Federal Rule of Evidence 804(b)(3) to not allow the admission of an accomplice's statement against his penal interest that inculpated the defendant), suggested (in dicta) that the motivation of a declarant to limit her own liability was relevant to the constitutional inquiry. Although it

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acknowledged that "the very fact that a statement is *genuinely* self-inculpatory is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause," *id.* at 605, 114 S.Ct. 2431 (emphasis added), it noted that whether a statement was in fact self-inculpatory could be hard to discern, since "[a] reasonable person ... might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." *Id.* at 604, 114 S.Ct. 2431.

To summarize, at the time the Kentucky Supreme Court affirmed Fulcher's conviction (1996), *Roberts* (1980) had identified the two ways that hearsay statements by an unavailable declarant could be admitted without violating the Confrontation Clause: either via a "firmly rooted hearsay exception," or with "particularized guarantees of trustworthiness." Though it was not made explicit until *Lilly* (1999), *Lee* (1986) had implied that there was no firmly rooted exception for "accomplices' confessions that inculpate a criminal defendant." *Lilly*, 527 U.S. at 134, 119 S.Ct. 1887. In particular, *Lee* held that such statements were "presumptively unreliable" and required an examination of the facts for indicia of reliability. In that examination, according to *Wright* (1990), the evidence had to " possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." 497 U.S. at 822, 110 S.Ct. 3139. And as for what a court *should* look to as an indication of reliability, in the case of a police interrogation, it included evidence that might rebut the "reasonable" possibility that the declarant thought that " implicating someone else would decrease his practical exposure to criminal liability, at least as far as sentencing goes." *Williamson*, 512 U.S. at 604, 114 S.Ct. 2431. Finally, it was clearly established that *Chambers* (1973) pertained to a defendant's right under the Due Process Clause to offer exculpatory hearsay, rather than the state's right to offer inculpatory hearsay without violating the Confrontation Clause.

*11 *The Kentucky Supreme Court's Decisional Rule.* Fulcher's brief to the Kentucky Supreme Court challenged the admission of Ash's statements as violating Fulcher's Confrontation Clause rights, but it did so by contending that the trial court misapplied the four-factor test from *Taylor* and *Chambers*. The Kentucky Supreme Court in turn rejected Fulcher's Confrontation Clause challenge solely by concluding that the trial court applied the *Taylor* test correctly. The court cited neither *Roberts*, nor *Lee*, nor *Wright*. (J.A. 98-101.)

On the first factor of the *Taylor* test, "the time of the declaration and the party to whom made," the court found that "the time of the declaration and the party to whom it was made are indeed indicative of the statements' trustworthiness, particularly in light of the fact that Ash spoke with police shortly after the crimes at issue had occurred." (J.A. 100.) On the second, "the existence of corroborating evidence in the case," the court found two pieces of corroborating evidence: the key, which the police found in the location that Ash had suggested (combined with Wright's testimony that Fulcher was present when disposing of the key was discussed); and "evidence found at the crime scene" -presumably blood-that was "consistent with Ash's statement that [Fulcher] had blood on his clothes." (J.A. 100-01.) Regarding the third, "the extent to which the declaration is against the declarant's penal interest," the court found that Ash's declaration was against her penal interest because Ash was in a custodial setting, advised of her rights, made aware that the police were investigating Fulcher's involvement in the murder, and not assured that she herself was not a suspect until after she made her statements. Moreover, the court found, Ash believed that her statements would expose her to criminal liability-for destroying evidence and disposing of the fruits of a crime-because she thought that Fulcher had been *in a fight* when she washed his sweatpants, and because she believed the true owner was seeking the key that she had discarded. (J.A. 101.) The fourth factor of the *Taylor* test, "the availability of a declarant as a witness," was undisputed. (*Id.*)

[9] *Inconsistency Between the Kentucky Rule and Clearly Established Federal Law.* The state correctly notes that the Kentucky court's failure to cite *Roberts*, *Lee*, or *Wright* in its opinion is irrelevant to whether its decision was contrary to

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federal law, provided that "neither the reasoning nor the result ... contradicts [those cases]." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). However, as Fulcher notes, *Taylor* 's four-factor test, and the Kentucky Supreme Court's application of it, were contrary to the reasoning and the result that federal law required in at least two ways.

First, the four-factor test required that statements against penal interest be corroborated by the very sort of extrinsic evidence that *Wright* forbade courts to consider when seeking the "particularized guarantees of trustworthiness" necessary to support hearsay that did not fall within a firmly rooted hearsay exception. *Wright* instructed courts to identify indicia of *inherent* reliability-without regard to "other evidence at trial"-before admitting hearsay statements by unavailable declarants. 497 U.S. at 822, 110 S.Ct. 3139. The Kentucky court directly contravened this rule with its references to the key, Wright's testimony, and the evidence found at the crime scene. The *Taylor* test contradicted federal law because it was impossible to satisfy the demands of both.

*12 Second, *Taylor* 's four-factor test allowed the admission of statements based upon a finding of trustworthiness that was inconsistent with the " particularized guarantees" required by the Supreme Court. In *Lee*, *Williamson* (a non-constitutional case), and *Lilly*, the court noted that the incentive that a person in police custody faces to implicate another-on the belief that doing so will limit his or her own liability-undermines the credibility of their statements. Yet in the Kentucky court's view, the fact that Ash gave her statement to the police *militated in favor* of its admissibility. Similarly, one point of debate in the Kentucky courts was whether Ash was sufficiently aware of her legal jeopardy to make a statement against her penal interest. (J.A. 99.) The state argued that she was, and the Kentucky courts agreed, notwithstanding the fact that the same conclusion made it more likely that she would fabricate facts to *limit* her perceived liability. Once again, the *Taylor* rule and the constitutional standard pulled in opposite directions.

Because Ash's statements clearly did not fall within a firmly rooted hearsay exception, and because the Supreme Court forbade courts to seek " particularized guarantees of trustworthiness" in the manner that *Taylor* 's four-part test *required*, we hold that the four-part test was "a rule that contradict[ed] the governing law." *Williams*, 529 U.S. at 405, 120 S.Ct. 1495. De novo review, according to the law at the time, is accordingly appropriate.

3. Applying De Novo Review, Ash's Statements Were Inadmissible

[10] Much of the above discussion is relevant to a de novo review of whether Ash's statements were admissible under federal law in 1996. *Roberts* commands that we seek "indicia of reliability" before admitting the statements, and upon finding that statements such as Ash's did not fall within a firmly rooted hearsay exception, the inquiry becomes whether "particularized guarantees of trustworthiness" support their admission (subject, of course, to the constraints of *Wright* and *Lee*).

The above discussion establishes that accomplice confessions that inculpate criminal defendants did not fit into a firmly rooted hearsay exception in 1996. Besides directing our attention to *Neuman* and *Gilliam*, Kentucky does not argue otherwise. In contrast, Fulcher identifies certain hearsay exceptions that *were* firmly rooted at the time, because they were "at least two centuries old ... [and recognized by] nearly four-fifths of the states," *White v. Illinois*, 502 U.S. 346, 356 n. 8, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (finding firmly rooted the exception for spontaneous declarations), or because they were recognized by the Supreme Court for over 150 years and "steeped in [Supreme Court] jurisprudence," *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (finding firmly rooted the exception for statements by co-conspirators "in the course and in furtherance of the conspiracy"). Kentucky does not contend that the exception for accomplices' confessions that inculpate criminal defendants has a similar pedigree.

*13 We next ask whether particularized guarantees

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of trustworthiness, "inherent" to Ash's statements, supported their admission. *Wright*, 497 U.S. at 822, 110 S.Ct. 3139. And for this we consider the substance of the statements as well as the circumstances under which Ash made them. At the trial stage, the state had the burden of proving that the statements were supported by particularized guarantees of trustworthiness. *See United States v. Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir.1991) (" [T]he prosecution must defeat a presumption against the admissibility ... by showing that their testimony possessed 'particularized guarantees of trustworthiness.' ") (quoting *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531). But "[a]t the federal stage, the habeas petitioner, not the State, has the burden of proving that the state courts were in error, not the other way around." *Hill*, 337 F.3d at 712. Fulcher must thus prove that, on account of the substance and circumstances of Ash's confession, her statements lacked the particularized guarantees of trustworthiness required by *Roberts*.

Fulcher contends first that Ash's statements were unreliable because she "was viewed as an accomplice by the police." (Appellant's Br. 35.) As the Kentucky Supreme Court noted, "she was advised of her rights, ... made aware that police were investigating [Fulcher's] involvement in a murder ... [and assured by the police] that she was not a suspect in the case only *after* she had provided police with her statement." (J.A. 101.) Fulcher concludes that "the confession exhibited insufficient guarantees of reliability" because, given Ash's fear of liability, "it may have been in [her] best interests to tell the authorities what they wanted to hear." (Appellant's Br. 35 (citing *Lee*, 476 U.S. at 544-45, 106 S.Ct. 2056).)

Kentucky responds that Ash's statements were sufficiently reliable to satisfy the rule in *Roberts* because Ash was not an accomplice to Fulcher's crimes, but was guilty only of tampering with the evidence. Thus, Kentucky argues, "Ash's statements were not made in a situation where she was attempting to shift or spread blame from herself to a confederate." (Appellee's Br. 26.) But the particular crime that Ash *might have been* charged with is beside the point. The threat-at the time she made her statements-that the police would charge her in the future gave her the incentive to finger Fulcher and *to claim* a limited role for herself. It would be anachronistic to conclude, on the basis of her claimed limited involvement, that her statements were sufficiently reliable to be admitted against Fulcher.

It is nonetheless useful to ask whether Ash's statements were of a sort that shifted or spread blame or mitigated her own culpability because, considering how *Hill* distinguished *Neuman*, there was a class of custodial hearsay statements that were admissible against a defendant, but not so directly implicating of the defendant to be of questionable reliability. Neither of Ash's statements falls within that class. Her first statement, that she washed Fulcher's sweatpants after he told her that he was in a fight, directly implicated him and limited her own liability by disavowing any knowledge of the murder. And her second statement, that Wright told her to throw away the key, similarly cast Wright in a guilty light, while limiting her own role. Both of these statements differ from the one at issue in *Neuman*, where the court admitted an out-of-court statement that inculpated only the declarant. In contrast, both of Ash's statements implicated others.

*14 Fulcher contends next that Ash's statements lacked sufficient guarantees of trustworthiness because the statements were made in police custody. The substance of this argument essentially mirrors his previous one, for what renders a statement elicited by police interrogation unreliable is the fact that the circumstances offer the person in custody an opportunity to shift scrutiny away from himself or herself by implicating another. *Cf. Franklin*, 415 F.3d at 547-48 (allowing the admission of an accomplice's confession because it was made "not to investigators but to his close friend ... [who] he had no reason to conclude would reveal those statements to law enforcement").

Third, Fulcher questions the reliability of Ash's statements because they were "made in response to the police interrogator's leading questions." (Appellant's Br. 37.) In *Lee*, the Supreme Court found a statement against penal interest unreliable in part because it was an "unsworn statement ...

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given in response to the questions of police, who ... knew what they were looking for, and ... was not tested in any manner by contemporaneous cross-examination." 476 U.S. at 544, 106 S.Ct. 2056. Here, while the police officer's questions do not appear to be particularly "leading," they are more leading than would typically be allowed in an adversarial proceeding. And as *Wright* noted, statements allowed in under the "particularized guarantees" exception had to be "so trustworthy that adversarial testing would add little to their reliability." *Wright*, 497 U.S. at 821, 110 S.Ct. 3139.

Finally, Fulcher cites two cases, *United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir.1991), and *Calvert v. Wilson*, 288 F.3d 823 (6th Cir.2002), in which the Sixth Circuit held certain accomplice confessions inadmissible for violating the Confrontation Clause. In *Gomez-Lemos*, this court noted that " 'once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists rather than accomplices.' " 939 F.2d at 330 (quoting *Lee*, 476 U.S. at 544-45, 106 S.Ct. 2056). And in *Calvert*, a case that parallels *Hill*, this court found insufficient guarantees of trustworthiness because, " [l]ike the accomplice in *Lee*, [the declarant] made his statements under the supervision of governmental authorities, in response to police officers' leading questions, which were asked without any contemporaneous cross-examination by adverse parties." 288 F.3d at 832.

Considering the circumstances of Ash's statements (police custody and interrogation, leading questions, and the police officers' suspicion of her wrongdoing) together with the substance of those statements (inculpating Fulcher and limiting her involvement with the crimes), we find that Ash's statements lacked "particularized guarantees of trustworthiness." In light of our conclusion that the statements did not fall under a firmly rooted hearsay exception, we hold that it was error to admit them.

4. The Kentucky Supreme Court's Error Was Not Harmless

*15 [11][12][13][14][15] "[C]onstitutional error is cause for federal habeas relief only if it has 'a substantial and injurious effect or influence in determining the jury's verdict.' " *Hill*, 337 F.3d at 718 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).
In determining whether Confrontation Clause error is harmless ..., the reviewing court should consider: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, ... and, of course, the overall strength of the prosecution's case."

Hill, 337 F.3d at 718 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (second alteration in original). And in contrast to what may be used to determine whether an error occurred, a court may consider corroborating evidence to determine whether the error was harmless. *Wright*, 497 U.S. at 823, 110 S.Ct. 3139. Neither side has the "burden" of proving that the error was harmless (or not), but when "the record is so evenly balanced" that "a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436-37, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995); *cf. Murillo*, 402 F.3d at 793 (finding that the brevity of the State's argument for harmlessness "makes it impossible [for the court] to say that the [erroneously admitted] statement ... was unlikely to have had a substantial and injurious effect on the verdict").

[16] Fulcher notes that the prosecution's case was " entirely circumstantial" and that no physical evidence linked Fulcher to the crime scene or the crime: no fingerprints, no clothing stained with the victim's blood, no traces of the victim's blood in Fulcher's car, and no murder weapon. Kentucky responds by arguing that the error was harmless for several reasons:
[1] [A]n eye witness/accomplice, Terry Wright, testified about Fulcher's conduct which he personally observed, in killing the victim and leaving the victim's premises with blood on

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Fulcher's clothing; [2] two other witnesses testified that Fulcher made statements to them amounting to an admission that he had killed the victim; [3] a third person testified that Fulcher had offered him a bribe in order to provide an alibi; and [4] Fulcher made incriminating statements to two police officers.

(Appellee's Br. 16.) We consider each of Kentucky's pieces of evidence in turn.

First, given our discussion above about reliability, we view Wright's testimony with some skepticism. As Fulcher notes, Wright was an alleged accomplice and an admitted drug user and dealer; " he admitted to being at the victim's house when money was stolen on a number of previous occasions;" "[h]e had the victim's blood on his clothing;" and "he was the only person seen at the victim's house at the time." (Appellant's Br. 43.) He thus had a substantial interest in shifting blame to Fulcher. Although we do not question that it was the jury's responsibility to assess Wright's credibility (including how well his testimony held up on cross-examination), we must consider the likelihood that Ash's statements *bolstered* Wright's account in the jury's eyes. Without Ash's account of washing the blood off of Fulcher's sweatpants, *nothing* would have physically connected Fulcher to the crime. Wright, about whom there existed ample physical evidence, would have provided the only link.

*16 Next, Kentucky cites the testimony of two persons to whom Fulcher allegedly admitted committing the crime. Fulcher notes that both were " jailhouse snitches," whose testimony should be given little weight. *See Zappulla v. New York*, 391 F.3d 462, 470 n. 3 (2d Cir.2004); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir.1993) (questioning the reliability of criminal informant testimony). Kentucky offers no response.

Kentucky's third item of evidence supporting a finding of harmlessness, Fulcher's effort to bribe someone to offer an alibi, shows only that Fulcher hoped (by illicit means) to avoid liability. Yet this same thinking motivates all defendants who hire lawyers. Fulcher's attempted bribery demonstrates that given Wright's testimony and the possible admission of Ash's statements, he (quite understandably) feared conviction. The bribe adds no independent evidence connecting Fulcher to the crime.

Kentucky's final item of evidence, Fulcher's incriminating statements to police officers, is insufficiently developed to deserve further consideration. The state offers no specificity as to what such statements declared.

[17] Kentucky also cites to the five-factor test of harmlessness in *Stapleton v. Wolfe*, 288 F.3d 863, 867-68 (6th Cir.2002), which instructs courts to consider:

(1) the importance of the witness' testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case.

(citations and quotation marks omitted). Kentucky does not explain how those factors would apply to this case, but Fulcher argues that they weigh *against* a finding of harmlessness. First, Fulcher contends the importance of Ash's statements was demonstrated by the jury asking to rehear the tape of Ash's statements and rendering its verdict half an hour later. (Kentucky chalks this up to perhaps their difficulty in understanding the audio, though at oral argument the state could offer no foundation for this suggestion.) Second, Fulcher contends that Ash's statements were not cumulative because no other evidence went to Fulcher's alleged effort to destroy evidence or connected the parties to the discarded key. Third, Fulcher notes that there was some inconsistency between Ash's statement and Wright's testimony: Wright testified that Fulcher was wearing either jeans or a favorite "Dolphins' suit" on the night of the murder, whereas Ash claimed to have washed grey sweatpants. Fourth, Ash was never cross-examined. And fifth, Fulcher noted that even after Ash, all of the remaining witnesses had a motive to lie.

Viewing the totality of the evidence, we cannot

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reject the possibility that the admission of Ash's statements had "a substantial and injurious effect or influence in determining the jury's verdict," and we have "grave doubt" that they did not. *Brecht*, 507 U.S. at 623, 113 S.Ct. 1710 (citation and quote omitted). Ash's statements bolstered the only direct account of Fulcher's involvement in the crime and connected to him the only physical (albeit circumstantial) evidence in the government's case. Moreover, the most logical reason as to why the jury asked to rehear the tape of Ash's interview was that they did not consider Wright's direct testimony alone to be sufficient for a guilty verdict. Finally, the Kentucky Supreme Court (applying the wrong standard) believed that the admissibility of Ash's statements was a "close call." (J.A. 102.) Kentucky may well have taken the risk that the verdict would be reversed for submitting Ash's statements because it "expected [the statements] to have punch and doubted the sufficiency of other evidence." *Murillo*, 402 F.3d at 793. For these reasons, we are unable to hold harmless the erroneous admission of Ash's statements.

C. *Crawford* Retroactivity

*17 Fulcher contends that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), announced a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (citations omitted), and thus warrants retroactive application to Fulcher's case. *Cf. Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). A panel of the Sixth Circuit rejected this conclusion in *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir.2005), but without substantial analysis. Given our decision to order that the writ be granted on the basis of pre-*Crawford* law, we find it unnecessary to address whether *Crawford* announced a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," or Judge Clay's concern that the analysis in *Dorchy* was insufficiently thorough to bind later panels of this court.

III. Conclusion

We hold that the admission of Ash's statements violated Fulcher's rights under the Confrontation Clause of the Sixth Amendment. Because we are unable to conclude that such error was harmless, we **REVERSE** the district court's judgment and **REMAND** for entry of the writ.

CLAY, Circuit Judge, concurring.

I write separately because I believe that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), establishes a watershed rule in criminal procedure requiring retroactive application under the Supreme Court's retroactivity analysis in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1990). *Crawford* 's retroactive application therefore makes *Crawford* the "clearly established" federal law at the time of direct review. When *Crawford* is applied to the facts of this case, Petitioner's Sixth Amendment rights under the Confrontation Clause were violated when his wife's taped statement was admitted into evidence. Because this error was not harmless, a writ of habeas corpus should be granted.

I.

BACKGROUND

On December 22, 1991, the beaten and stabbed body of Charlie Bramer was discovered in his home in Jefferson County, Kentucky. After an investigation, Petitioner was charged with and convicted of the crime.

At Petitioner's jury trial, the State of Kentucky relied largely on testimonial evidence for Petitioner's conviction. The State put inmates on the witness stand who testified that Petitioner had told them, in jailhouse conversations, that he had committed the murder. The State also put Terry Wright on the stand. Wright had confessed to helping Petitioner commit the murder, alleging that Wright and Petitioner went to the victim's home in order to rob the victim, but that the victim discovered Wright and Petitioner during the course of the robbery and chased them out of the house.

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Wright further testified that Wright and Petitioner later returned to the victim's home and Wright waited outside while Petitioner entered the home. When Wright entered the home several minutes later, Wright alleges that he found Petitioner attacking the victim with a hammer. Wright testified that he made an unsuccessful attempt to stop Petitioner.

*18 The state also called Patricia Ash Fulcher ("Ash ") to testify against Petitioner. Ash had given the police a statement shortly after the investigation into the crime began, but had since married Petitioner, asserted spousal privilege under Kentucky Rule of Evidence 107(b), and refused to testify against Petitioner. The state played Ash's tape-recorded statement to the police for the jury, albeit over the objections of Petitioner's counsel. The trial court ruled that the statement was admissible as an exception to the hearsay rule as a statement against penal interest because the contents of Ash's statements inculpated both Petitioner and Ash herself.

Ash's statement had been made while in the custody of the Jefferson County police. Ash was stopped on January 2, 1992 while driving a car that matched the description of Petitioner's automobile. The police impounded the car and took Ash in for questioning. The police read Ash her *Miranda* rights and proceeded to question her.

During the course of questioning, Ash revealed that over the course of the December 1991 holidays, Petitioner had arrived home late one evening and asked Ash to wash the clothes Petitioner had been wearing. Ash indicated that there were some spots of blood on the pants, and that Petitioner explained the blood by saying that he had been in a fight. Ash also stated that Terry Wright, also present at the time, asked Ash to dispose of a key. Ash admitted that she threw the key into the sewers, where police subsequently recovered it and confirmed that the key belonged to the victim.

Police found no evidence at the victim's house to link Petitioner to the crime scene. A murder weapon was never recovered.

During jury deliberations, the jury requested both Ash's tape recorded statement and a tape recorder. Within an hour of hearing the tape, the jury returned with a conviction. After unsuccessful direct appeals and collateral attacks in state court, Petitioner now requests habeas relief on the basis of this improperly admitted evidence.

II.

CRAWFORD ANALYSIS

This Court reviews the decision of the district court to deny a writ of habeas corpus *de novo*. *Allen v. Yukins*, 366 F.3d 396, 399 (6th Cir.2004) (citing *Gonzales v. Elo*, 233 F.3d 348, 352 (6th Cir.2000)).

A. *Crawford* 's Retroactivity Is an Issue of First Impression in This Circuit

The lead opinion opines that this Court has already ruled that *Crawford* does not apply retroactively. It is true that panels of this Court are bound by the published decisions of prior panels as controlling precedent. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir.1985). The *Dorchy v. Jones* case cited in the lead opinion, however, does not actually treat *Crawford* 's retroactivity sufficiently to bind subsequent panels of this Court. This Court's entire treatment of *Crawford* in that case consists of the following:

> Under most circumstances, however, newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review. *Teague v. Lane*, 489 U.S. 288, 305-11, 109 S.Ct. 1060, 103 L.Ed.2d 334 ... (1989) (holding that a habeas petitioner could not benefit from a recent Supreme Court decision declaring racially-based peremptory challenges invalid, because that decision could not be applied retroactively to cases on collateral review) .... *Teague* thus prohibits [petitioner] from availing himself of the new rule articulated in *Crawford*. The question before us is therefore whether the analysis by the [state court] was contrary to, or involved an unreasonable application of, *Roberts*.

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*19 *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir.2005). The *Dorchy* panel did not subject *Crawford* to the *Teague* retroactivity analysis. These two sentences are dicta and do not go to the holding of the case. In fact, the *Dorchy* panel affirmed the district court's grant of a writ because the Court found the state court's ruling to have been an "unreasonable application of" clearly established confrontation clause jurisprudence under *Roberts* at the time of the state court decision. *See id.* at 791. Subsequent panels of this Court are not bound by prior panels on issues not actually reached by those prior panels. *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 298 (2005).

B. The *Crawford* Holding

The Supreme Court's 2004 decision in *Crawford v. Washington* overruled the *Roberts* indicia of reliability test for mutually inculpatory statements. *See* 541 U.S. at 68, 124 S.Ct. 1354. In *Crawford*, the state sought to admit a statement made by the criminal defendant's wife shortly after the crime in question occurred. *Id.* at 40, 124 S.Ct. 1354. The statement was made to the police while the wife was in a custodial setting and tended to inculpate the wife, insofar as it showed that she facilitated her husband's commission of the crime. *See id.* In the state of Washington, spousal privilege does not extend to out-of-court statements admissible under an exception to the hearsay rule. *Id.* The trial court admitted the statement under the "against penal interest" exception to the hearsay rule. *Id.*

The Supreme Court of Washington upheld the conviction and the propriety of the statement's admission under the *Roberts* indicia of reliability test. *Id.* at 41-42, 124 S.Ct. 1354. On direct review, the United States Supreme Court reversed, finding that *Roberts* had proven too nebulous a standard for the lower courts to employ in insuring that rights under the Confrontation Clause were properly guaranteed. *Id.* at 68-69, 124 S.Ct. 1354. The Court concluded that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional concerns is the one the Constitution actually prescribes: confrontation." *Id.* at 69, 124 S.Ct. 1354.

In reaching its conclusion, the Supreme Court expanded on the principles underlying the Confrontation Clause:

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that ... English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; *accord, Dutton v. Evans*, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)(Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices ....

*20 This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

....

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by

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testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Cf.* 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses ... is much more conducive to the clearing up of truth") ....

....

Where testimonial evidence is at issue ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of " testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 36, 51, 61-62, 68, 124 S.Ct. 1354.

Respondent does not dispute that had *Crawford* come out prior to the final disposition of Petitioner's case on direct review, the Court's holding would have applied to Petitioner's case.

C. Watershed Rules in Criminal Procedure

As a general rule, new rules of criminal procedure do not have retroactive effect and are unavailable for use in a collateral attack to a criminal conviction. *See Teague*, 489 U.S. at 316, 109 S.Ct. 1060. The Supreme Court has set forth an exception to this general rule, however: when the new rule represents a "watershed rule" of criminal procedure. *Id.* The only example of such a watershed rule ever cited by a majority of the Court since issuing the *Teague* decision is the right to counsel, as set forth in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

The Court has explained that a "watershed rule" is a rule which goes to the "fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). The procedure at issue would be "central to an accurate determination of innocence or guilt ...." *Teague*, 489 U.S. at 313, 109 S.Ct. 1060. "That the new procedural rule is ' fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously diminished*.' " *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004) (quoting *Teague*, 489 U.S. at 313, 109 S.Ct. 1060) (emphasis in original). "A rule that qualified under this [watershed rule] exception must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. 1060).

*21 To date, the Supreme Court has yet to announce a "watershed rule" of criminal procedure since *Teague*. Indeed, the *Teague* decision noted that the Court doubted whether there were many fundamental tenets of due process that were yet to be discovered. 489 U.S. at 313, 109 S.Ct. 1060. The *Teague* Court itself found that the fair cross section requirement for jury venire did not merit retroactive application. *Id.* at 314, 109 S.Ct. 1060.

Since *Teague*, the Supreme Court has consistently refused to apply new rules in capital sentencing in a retroactive fashion. The *Sawyer* Court dealt with a new rule requiring a sentencing reversal when a prosecutor's remarks to the jury tended to diminish the jury's responsibility in recommending a death sentence. *See Sawyer*, 497 U.S. at 244-45, 110 S.Ct. 2822. The Court reasoned that because the new rule was a prophylactic one which benefitted criminal defendants only insofar as those defendants could not make the requisite showing of fundamental unfairness under the previously applicable standard, the rule therefore was not an " 'absolute prerequisite to fundamental fairness.' " *Id.* (quoting *Teague*, 489 U.S. at 314, 109 S.Ct. 1060.) Similarly, in *Graham v. Collins* the Court reasoned that the denial of special jury instructions on mitigation factors during the capital sentencing phase did not " 'seriously diminish[ ] the likelihood

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of obtaining an accurate determination' in [the defendant's] sentencing proceeding." 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (quoting *Butler v. McKellar*, 494 U.S. 407, 416, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)); *see also O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (refusing to grant retroactive application of a new rule requiring trial courts to allow capital defendants to rebut prosecutions' assertions of continued dangerousness as a factor in death sentence consideration, when defendants would be ineligible for parole under a life sentence); *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 2515, 159 L.Ed.2d 494 (2004) (refusing to give retroactive effect to the Court's new rule that invalidated a state practice of requiring juries to disregard mitigating factors not found unanimously in capital sentencing cases).

The Court has continued to decline retroactivity in the context of capital sentencing determinations. In *Schriro*, the Court ruled that its newly announced rule requiring juries, and not judges, to find aggravating circumstances necessary for imposition of the death penalty was not a watershed rule. *Schriro*, 124 S.Ct. at 2525. The *Schriro* Court found the evidence "too equivocal" to support a determination that judicial factfinding so "seriously diminished" accuracy in the criminal proceeding that there was "an impermissibly large risk of punishing conduct the law does not reach." *Id.* (internal quotations and citations omitted). The ruling in *Schriro* has been understood to mean that the Court's *Apprendi* decision-requiring juries to make the factual determination for anything increasing a defendant's sentence beyond the statutory maximum-does not state a watershed rule in criminal procedure. *Blakely v. Washington*, 542 U.S. 296, 323, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("[W]e [held] in *Schriro v. Summerlin* ... that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review ....").

*22 Beyond the capital sentencing arena, the Court has found that a habeas petitioner's proposed rule-that one day's notice of the state's intention to call an opposing witness be found *per se* violative of due process-"has none of the primacy and centrality of [a watershed rule] which may be thought to be within the [*Teague*] exception." *Gray v. Netherland*, 518 U.S. 152, 170, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (internal quotations and citations omitted). The Court has also found that a circuit court inappropriately applied a new rule in a retroactive manner when the appeals court granted a request for habeas corpus relief upon finding that a state practice of permitting the prosecution to resubmit evidence of prior convictions in subsequent resentencing hearings (after having failed to prove prior convictions at the original sentencing hearing) violated the Double Jeopardy Clause. *See Caspari v. Bohlen*, 510 U.S. 383, 396-97, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) (acting on habeas petition). The Court reasoned that "[a]pplying the Double Jeopardy Clause to successive noncapital sentencing is not such a ground breaking occurrence" as to warrant retroactive application. *Id.* at 396, 114 S.Ct. 948.

Prior to the retroactivity standard articulated in *Teague*, the Court balanced prudential concerns in determining whether a new rule should be granted retroactive effect. The Court consistently declined to grant retroactive effect to rules designed to deter police misconduct. *See Linkletter v. Walker*, 381 U.S. 618, 636-40, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) (the exclusionary rule to state conduct); *Johnson v. New Jersey*, 384 U.S. 719, 733-35, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) (*Miranda* requirements); *Solem v. Stumes*, 465 U.S. 638, 650, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) (the invalidity of any waiver of the right to right to counsel after the invocation of such right and before counsel can appear); *Tehan v. United States*, 382 U.S. 406, 416-19, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) (the right of the accused not to have the prosecutor comment on the accused's election to keep silent); *Stovall v. Denno*, 388 U.S. 293, 299, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (the right to counsel during pre-trial identification procedures).

Consistent with its post-*Teague* decisions declining to give retroactive effect to decisions affecting the jury's role in fact-finding, the pre-*Teague* Court also declined to apply retroactively its determination that criminal defendants enjoy a right to a jury trial in state criminal prosecutions. *See Schriro*, 124 S.Ct. at 2525 (discussing the Court's refusal in *DeStefano*

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v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), to apply *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), retroactively). The Court reasoned that if a trial without a jury was not "impermissibly inaccurate" then a judge's determination of aggravating factors in death penalty deliberations could not require retroactive renunciation. *Id.* at 2526.

In contrast, prior to *Teague*, the Court granted retroactive effect to a number of new rules going to the central tenets of our criminal justice system. The Court granted retroactive effect to the right to counsel as articulated in *Gideon v. Wainwright*. The Court also granted retroactive effect to the application of the Double Jeopardy Clause to the states. *See Robinson v. Neil*, 409 U.S. 505, 510, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). The Court additionally granted retroactive effect to a rule proscribing state laws which grant the prosecution unlimited challenges for cause against any prospective juror with any reservations about the death penalty in capital cases. *See Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

***23** Significantly, in two pre-*Teague* cases, the Court twice granted retroactive effect to new rules dealing with the Confrontation Clause. In *Roberts v. Russell*, 392 U.S. 293, 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968) (*per curiam*), the Court held that its rule articulated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) , merited retroactive application. The *Bruton* rule held that limiting jury instructions could not cure the harm caused in a joint trial by the introduction of a codefendant's extrajudicial confession. 391 U.S. at 135, 88 S.Ct. 1620. The Court reasoned that the admission without the opportunity for cross-examination resulted in " 'serious flaws in the fact-finding process at trial.' " *Roberts*, 392 U.S. at 294, 88 S.Ct. 1921 (citing *Stovall*, 388 U.S. at 298, 87 S.Ct. 1967). The Court held that the admission of the testimonial statement absent confrontation " went to the basis of the fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of his guilt or innocence." *Id.* (internal citations and quotations omitted). Similarly, in *Berger v. California*, 393 U.S. 314, 314-15, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969) (*per curiam*), the Court retroactively applied the rule announced in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). The *Barber* Court held that states may not use at trial the prehearing testimony of a witness in lieu of live testimony unless the state has made a good faith effort to secure the witness' presence. *Id.* at 721, 88 S.Ct. 1318. The Court noted that "one of the most important objects of the right of confrontation [is] to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Berger*, 393 U.S. at 315, 89 S.Ct. 540.

In the decade and a half since *Teague*, the Supreme Court has yet to be confronted with a rule akin to those presented to the Court in *Gideon*, *Robinson*, *Witherspoon*, *Bruton*, and *Berger*. Rather, the Court has been asked to rule on sentencing issues which invoke either Eighth Amendment rights in the context of capital cases or the division between judge and jury in fact-finding. The Court's refusal to apply these types of new rules retroactively is consistent with its pre-*Teague* practice. In contrast, the rule presented in *Crawford* is much more analogous to those pre-*Teague* cases (*Gideon*, *Robinson*, *Witherspoon*, *Bruton*, and *Berger*) which the Court found articulated new rules meriting retroactive application. A holding that *Crawford* articulates a watershed rule in criminal procedure is entirely consistent with the Supreme Court's historical retroactivity jurisprudence. *See supra*.

D. *Crawford* as a Watershed Rule

1. The Circuit Split

Several circuit courts of appeal have addressed the retroactivity of *Crawford*. The Second, Tenth, and Seventh Circuits have held that *Crawford* does not apply retroactively. The Ninth Circuit has held that Crawford does apply retroactively and that AEDPA does not bar such retroactive application.

***24** The Second Circuit held in *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir.2004), *cert. denied sub. nom. by Mungo v. Greene*, --- U.S. ----, 125

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S.Ct. 1936, 161 L.Ed.2d 778 (2005), that *Crawford* does not merit retroactive application. The Second Circuit noted that the question turned on "whether the rule is necessary to the fundamental fairness, and improves the accuracy, of criminal proceedings." *Id.* at 335. The court then reasoned that the rule would preclude some unreliable testimony but would also work to exclude previously admissible testimony which bore significant indicia of reliability. The Second Circuit therefore concluded that the *Crawford* rule would not "improve the accuracy of the trial process overall" and held *Crawford* to be a prospective rule only. *Id.* at 336. The Seventh Circuit employed similar reasoning in also holding that *Crawford* was not a watershed rule of criminal procedure. *See Bintz v. Bertrand*, 403 F.3d 859, 867 (2005), *cert. den'd by* --- U.S. ----, 126 S.Ct. 174, 163 L.Ed.2d 200 (2005).

The Tenth Circuit also held in *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir.2005), *cert. den'd by* 543 U.S. 1079, 125 S.Ct. 940, 160 L.Ed.2d 822 (2005), that *Crawford* does not apply retroactively. The Tenth Circuit did not reach the merits of the retroactivity doctrine, but held that AEDPA precluded habeas relief on the basis of any federal law made clear only *after* the date of the state court decision. *Id.* at 1224 (reasoning that a "new rule" under *Teague* was presumptively not "clearly established federal law" at the time of the state court decision). In their decisions denying retroactivity, neither the Second nor Seventh Circuits addressed whether AEDPA would independently preclude application of a new rule retroactively.

The Ninth Circuit, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir.2005), *rehr'g en banc den'd by* 408 F.3d 1127 (9th Cir.2005), found *Crawford* to merit retroactive application. The Ninth Circuit looked to the Supreme Court's most recent treatment of retroactivity analysis in *Schriro* for lessons in determining the existence of a watershed rule from *Crawford*. *Bockting*, at 1013. The Ninth Circuit looked to Justice Scalia's extensive treatment of the history and centrality of confrontation to our system of justice to conclude that confrontation is a fundamental precept of our legal regime. *Id.* at 1013. The Ninth Circuit then looked to the Supreme Court's historical treatment of the Confrontation Clause, and the language accompanying its many Confrontation Clause cases, to determine that "[t]he Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy." *Id.* at 1017. The Ninth Circuit reasoned that *Schriro* 's question of whether the absence of confrontation "so seriously diminish[es] accuracy" was answered by *Crawford* itself. *Id.* at 1017. The Ninth Circuit pointed to language in *Crawford* addressing the *Roberts* rule as "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.* at 1017.

*25 The Ninth Circuit concluded its analysis in *Bockting* by again echoing the language of the *Crawford* decision in noting that the "Confrontation Clause ... reflects a judgment ... about how reliability can best be determined." *Id.* at 1127 (quoting *Crawford*, 124 S.Ct. at 1370). The court considered the Second Circuit's contrary conclusions-that the *Crawford* rule does not improve overall accuracy-as an impermissible superimposition of that court's own analysis over that of the Supreme Court and the Constitution itself. *Id.* at 1020 ("The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment.")

2. Crawford Merits Retroactive Application

The *Teague* analysis requires this Court to 1) determine whether *Crawford* announced a new rule, 2) determine whether that rule was a "watershed rule " in criminal procedure, 3) apply the rule in the case at bar (if the rule is found to be retroactive), and 4) determine whether any resulting error was harmless. Because Ash's statement falls squarely within the facts of *Crawford*, the parties do not dispute the statement's inadmissibility under *Crawford*.

a. Crawford announced a new rule

Whether Crawford's rule is new depends on whether

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the result was "dictated by the then-existing precedent." *Beard*, 124 S.Ct. at 2511. The *Crawford* Court observed that the rule of *Roberts* had proven too nebulous a standard for proper application; the Court further noted that "*Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears particularized guarantees of trustworthiness." *Crawford*, 124 S.Ct. at 1369. The Court then departed from precedent and held that testimonial statements may not be admitted against a criminal defendant absent unavailability of the declarant and the right of confrontation. The *Crawford* test eliminated the ability of a court to assess " particularized guarantees of trustworthiness" of testimonial statements and admit them absent constitutional confrontation. Past precedent, therefore, did not dictate the result in *Crawford*. Rather, *Crawford* overruled the *Roberts* test for testimonial statements.

Every circuit court to address *Crawford* has found that *Crawford* sets forth a new rule. *See Bockting*, at 1013; *Bintz*, 403 F.3d at 866; *Brown*, 381 F.3d at 1226; *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir.2004) (treating *Crawford* as creating a new rule but finding the case inapplicable); *Horton*, 370 F.3d at 83. *Crawford* therefore announces a "new rule."

b. Crawford is a "watershed rule"

The Ninth Circuit's analysis is compelling. *Teague* demands that a watershed rule go to "procedures implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307, 109 S.Ct. 1060. A "watershed rule" is a rule which goes to the "fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, 110 S.Ct. 1257. The procedure at issue would be "central to an accurate determination of innocence or guilt ...." *Teague*, 489 U.S. at 313, 109 S.Ct. 1060. "That the new procedural rule is ' fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.' " *Schriro*, 124 S.Ct. at 2523 (quoting *Teague*, 489 U.S. at 313, 109 S.Ct. 1060). "A rule that qualified under this [watershed rule] exception must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242, 110 S.Ct. 2822 (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. 1060).

*26 The Ninth Circuit efficiently summarized the Supreme Court's extensive discussion over the years on the role of the Confrontation Clause in the American criminal justice system.

The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy. *See, e.g., Crawford*, 124 S.Ct. at 1370 ("This open examination of witnesses ... is much more conducive to the clearing up of truth.") (quoting 3 Blackstone, Commentaries * 373); *White v. Illinois*, 502 U.S. 346, 355, 112 S.Ct. 736, 116 L.Ed.2d 848 ... (1992) (evaluating a Confrontation Clause claim against the benchmark of accuracy); *Tennessee v. Street*, 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d 425 ... (1985) (describing the "Confrontation Clause's very mission " as "to advance the accuracy of the truth-determining process in criminal trials") (internal quotation omitted); *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 65 L.Ed.2d 597 ... (1980) (stating the purpose of the Confrontation Clause is to "augment accuracy in the factfinding process"); *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 60 L.Ed.2d 713 ... (1979) (plurality) (" The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials."); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 ... (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the ' accuracy of the truth-determining process.' "); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed.2d 213 ... (1970) (plurality) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials ...."); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 ... (1965) ("Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood

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and bringing out the truth in the trial of a criminal case."); *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 ... (1895) (describing the "primary object" of the Confrontation Clause as "to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). *See also* M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better") (quoted in *Crawford*, 124 S.Ct. at 1370).

"[T]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 ... (1990) .... "[T]he combined effect of these elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Id.* at 846, 110 S.Ct. 3157 ....

*27 *Bockting*, at 1018.

The Second and Seventh Circuits' rejection of Crawford's retroactivity is critically flawed. Both Circuits dispute the presumption inherent in the Constitution itself. As Justice Scalia noted, the Confrontation Clause *demands* that the reliability of a statement be determined via confrontation, and not by any independent judicial determination. *Crawford*, 541 U.S. at 63, 124 S.Ct. 1354. The Confrontation Clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* Any determination, by any court, that compliance with the Confrontation Clause requirements fails to go to the accuracy of the criminal proceeding is therefore a direct contradiction of the Clause itself and a unreasonable interpretation of the Constitution.

c. AEDPA does not preclude application

The Tenth Circuit reasoned that AEDPA precludes the retroactive application of any new rule in criminal procedure because § 2254(d) states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Tenth Circuit's reasoning fails, however, to look beyond subsection (d) of § 2254 or consider the normal implications of retroactivity.

The Supreme Court has directed lower courts to undertake both an AEDPA inquiry and a *Teague* inquiry in retroactivity cases, *Horn*, 536 U.S. at 272, 122 S.Ct. 2147, impliedly endorsing the application of *Teague* in the AEDPA context. This interpretation of Supreme Court direction appears consistent with congressional intent. An analysis of the entirety of § 2254 shows that Congress contemplated retroactive rules in the habeas context. Section 28 U.S.C. § 2254(e) explicitly provides for their application in proceedings involving state habeas petitions. "If the applicant

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has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that ... the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2254(e). Because § 2254(e) supplements the operation of § 2254(d), Congress must have considered that habeas relief could be granted on the basis of retroactive rules.

*28 The Tenth Circuit's perspective also ignores the normal implications of retroactivity analysis. Applying *Crawford* retroactively would make *Crawford* the "clearly established law at the time," albeit only as a legal construct, but that is always the consequence of retroactive application and why the courts invoke the doctrine only sparingly. Therefore the appropriate analysis in this case is under *Crawford* and not *Ohio v. Roberts*. The Supreme Court of Kentucky relied on its own test under *Taylor* to admit testimonial statements from Ash against Petitioner without a right to confrontation. Under *Crawford*, Petitioner should have been able to cross-examine any testimonial witness, and absent confrontation, the admission of Ash's statement was error. Therefore the Supreme Court of Kentucky's decision was "contrary to" established Supreme Court precedent in *Crawford*, as applied retroactively under *Teague* and *Schriro*.

E. The Error Was Not Harmless

A Confrontation Clause violation is cause for federal habeas relief only if it has "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). This Court has held that the *Brecht* standard survived the enactment of AEDPA, because "if a petitioner can pass *Brecht* analysis, 'he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt ... resulted from an unreasonable application of [federal law].' " *Hill v. Hofbauer*, 337 F.3d 706, 718 (6th Cir.2003) (quoting *Nevers v. Killinger*, 169 F.3d 352, 371-72 (6th Cir.1999)).

Several factors inform this Court's analysis about whether such substantial or injurious effect or influence exist in the context of a Confrontation Clause claim, including:

'[1] the importance of the ... testimony in the prosecution's case,
[2] whether the testimony was cumulative,
[3] the presence ... of evidence corroborating or contradicting the testimony of the witness on material points,
[4] the extent of cross-examination otherwise permitted, and ...
[5] the overall strength of the prosecution's case.'

Madrigal v. Bagley, 413 F.3d 548, 552 (6th Cir.2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). If this Court is in "grave doubt" as to whether the error was harmless, it should "treat the error, not as if it were harmless, but as if it affected the verdict." *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

The evidence presented at Petitioner's trial was not overwhelming. The prosecutor relied on 1) testimony from several inmates, who testified that Petitioner inculpated himself to them while in jail; 2) Terry Wright, who testified that Petitioner, and not Wright, actually killed Bramer; and 3) Ash's statement, which linked Petitioner to the crime scene through the statements about blood on Petitioner's clothes and the key. Ash's statement therefore played a key role in the prosecution's case.

*29 Respondent contends that Ash's statement was cumulative because Wright testified to Petitioner's actions at the crime scene and to the key found near Petitioner's home. But without Ash's statement, a jury would have been inclined to regard Wright's statement with a great deal of skepticism. Wright admitted to being a drug dealer and to helping others steal from the victim in previous burglaries. Physical evidence actually linked Wright to the crime more than Petitioner; the police actually discovered the victim's blood on Wright's clothes, physical evidence that the police did not have on Petitioner. Wright therefore had a very strong and clear motive to exculpate himself while inculpating Petitioner.

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The only other evidence introduced at trial consisted of testimony from jailhouse snitches that Petitioner had admitted the crime to them. A jury would normally view testimony from inmates housed with Petitioner with some skepticism. *See Zappulla v. New York*, 391 F.3d 462, 470 n. 3 (2d Cir.2004) (noting the unreliability of "jailhouse snitches"). The jury's deliberations further indicate that the jury placed some weight on Ash's statement. The jury began deliberations on April 22, 2004. On the afternoon on April 23rd, the jurors asked to have the tape of Ash's statement and a tape recorder. The judge played the tape for the jurors. Within an hour of hearing the tape the jury returned its guilty verdict. Given the lack of physical evidence in the case, and that without Ash's statement, the government's chief evidence would have come from an admitted accomplice and jailhouse snitches, this Court can only be left with " grave doubts" about the influence and effect of the improper introduction of the tape at trial.

III.

ROBERTS ANALYSIS

The lead opinion is correct that even absent the application of *Crawford*, the introduction of Ash's taped statement was contrary to clearly established law at the time and therefore would require that we grant the requested writ under normal AEDPA analysis. I write separately here because I believe that *Crawford* retroactivity is a threshold matter and that review of the statement under *Ohio v. Roberts* should only follow if *Crawford* is found not to be a watershed rule of criminal procedure.

A. The AEDPA Standard

AEDPA "requires heightened respect for state court factual and legal determinations." *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir.1998). Section 2254(d) states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

*30 28 U.S.C. § 2254(d).

Under § 2254(d)(1), a state court decision is " contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the prisoner's case." *Id.* " '[C]learly established Federal law, as determined by the Supreme Court of the United States,' refers to 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.' " *Williams v. Bagley*, 380 F.3d 932, 942 (6th Cir.2004) (quoting *Williams*, 529 U.S. at 412, 120 S.Ct. 1495).

B. The Supreme Court of Kentucky Opinion

In denying relief for Petitioner under the Confrontation Clause, the Supreme Court of Kentucky determined that Ash's statement bore sufficient indicia of reliability under a Kentucky high court test as set forth in *Taylor v. Commonwealth*, 821 S.W.2d 72, 74 (Ky.1991). The *Taylor* decision drew on an earlier Supreme Court of Kentucky decision, which in turn purported to interpret the United States Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), as establishing criteria for use in determining when a statement

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against penal interest is admissible against a criminal defendant without violating the Confrontation Clause. *See Taylor*, 821 S.W.2d at 74. The *Taylor* decision set forth four criteria for consideration by Kentucky courts faced with a request to admit, against a criminal defendant, an out-of-court statement by an accomplice as a statement against the accomplice's penal interest:
(1) [t]he time of the declaration and the party to whom made;
(2) the existence of corroborating evidence in the case;
(3) the extent to which the declaration is against the declarant's penal interest[;] and
(4) the availability of a declarant as a witness.

Id.

The Supreme Court of Kentucky applied this test to Petitioner's case. The court found the following to support the statement's admission:
1) "[T]he time of the declaration [shortly after the crime] and the party to whom it was made [the police] are indeed indicative of the statements' trustworthiness." (J.A. at 100.)
2) The court then noted that "the key-which police found where Ash said it would be-was sufficient corroborating evidence." (J.A. at 101.)
3) The court found Ash's statement as to the key was buttressed by the testimony of Petitioner's accomplice at trial.
4) The court found additional corroboration of Ash's statement in the actual crime scene, which would indicate that Petitioner would have had blood on his clothes.
*31 5) Finally, the court found that the statement was assuredly "against Ash's penal interest," inasmuch as she was in a custodial setting, had been read her *Miranda* rights, was aware that the police were investigating a murder, and would have known her actions, as disclosed to the police, helped Petitioner dispose of the fruits of a crime and evidence.

The Supreme Court of Kentucky concluded its Confrontation Clause analysis by noting that it was not an abuse of discretion for the trial court to admit Ash's taped statement when an "objective measure of whether [the statement] was against [Ash's] penal interests" supported the trial court's decision. (J.A. at 102.)

C. The *Taylor* Test Is Contrary to Clearly Established Federal Law

The *Taylor* test is "contrary to clearly established Federal law" when used to evaluate the admissibility of an out-of-court, mutually inculpatory statement. The United States Supreme Court has *ruled explicitly* that independent corroborating evidence *may not be used* as indicia of reliability when determining whether an out-of-court statement is sufficiently trustworthy to admit against a criminal defendant. *See Idaho v. Wright*, 497 U.S. 805, 819, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). The *Wright* court devoted considerable space to explaining why the "use of corroborating evidence to support a hearsay statement" infringes on Confrontation Clause guarantees:

> [W]e are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial .... [T]he use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the ... Confrontation Clause .... The true danger inherent in this type of hearsay [hearsay from a co-defendant] is, in fact, its selective reliability .... There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement.

Id. at 823-24, 110 S.Ct. 3139. Such explicit exposition on the law and its rationales made the contours of Confrontation Clause jurisprudence very clear in 1996, at least insofar as the (impermissible) use of corroborating evidence to "

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bootstrap" the reliability of hearsay was concerned.

Respondent cites to *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002), for the proposition that a state court need not cite, or even be aware of, Supreme Court precedent, so long as " neither the reasoning nor the result of the state-court decision contradicts them." (Resp.Br.23.) But the reasoning-*i.e.*, the *Taylor* test-used by the Kentucky high court here *directly contradicts* clearly established Supreme Court precedent. Moreover, this is not the first time that this Court has encountered a Kentucky state court relying on *Taylor* to admit an accomplice's mutually inculpatory statements against a criminal defendant. In *Vincent v. Seabold*, 226 F.3d 681 (6th Cir.2000), this Court held that the trial court's reliance on *Taylor* resulted in a result "contrary to" clearly established Supreme Court precedent, *id.* at 684-85, 689. While the *Vincent* panel did not elaborate on the particulars of the *Taylor* test, its ultimate finding demonstrates the constitutional infirmity of *Taylor* 's ongoing application by the Kentucky courts in these circumstances.

***32 Because the Supreme Court of Kentucky used a legal standard manifestly "contrary to" clearly established federal law, this Court reviews the admissibility of Ash's statement *de novo*. *Williams*, 529 U.S. at 413, 120 S.Ct. 1495 ("Under the ' contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite that reached by this Court on a question of law ...."); 28 U.S.C. § 2254(d)(1).**

D. Ash's Statement Was Inadmissible Under *Roberts*

"In *Ohio v. Roberts*, the Supreme Court set forth 'a general approach for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause.' " *Wright*, 497 U.S. at 815, 110 S.Ct. 3139 (citing *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). *Roberts* set forth two ways in which the "indicia of reliability" requirement could be met:

1) where the hearsay statement "falls within a firmly rooted hearsay exception," or
2) where it is supported by "a showing of particularized guarantees of trustworthiness."

Id. at 816, 110 S.Ct. 3139 (citing *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531); *see also Lee v. Illinois*, 476 U.S. 530, 543, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) ("Even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' ") (footnote and citation omitted).

1. Statement Against Penal Interest Is Not a Firmly Rooted Hearsay Exception

Respondent argues that a statement against penal interest is, alternatively, either a "firmly rooted hearsay exception," or that the state of the law in 1996 was ambiguous enough to preclude this Court from finding that a state court's determination as such in 1996 was "contrary to" clearly established Supreme Court precedent. At this stage of this analysis, however, this Court has established that the Supreme Court of Kentucky's application of the *Taylor* criteria was "contrary to" clearly established precedent. *See supra.* AEDPA, therefore, does not require that this Court defer to the Supreme Court of Kentucky's reasoning or conclusions on this issue inasmuch as they pertain to matters of constitutional law. Rather, this Court analyzes the admissibility of the statement *de novo*, treating the *Roberts* analysis as the first step in its harmless error review-*i.e.*, was the Supreme Court of Kentucky's application of a constitutionally infirm test merely "harmless error"? That is, would the admissibility of the statement have been upheld under the correct legal theory? If we find the statement inadmissible, we next ask whether the improper admission undermines confidence in the outcome of the trial.

"Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding

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judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 497 U.S. at 817, 110 S.Ct. 3139. A hearsay exception is "firmly rooted" if, in light of "longstanding judicial and legislative experience," *Wright*, 497 U.S. at 817, 110 S.Ct. 3139, it "rests [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.' " *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531 (quoting *Mattox v. United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409 (1895)). A " firmly rooted" hearsay category has conditions which have proven over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial. *Mattox*, 156 U.S. at 244, 15 S.Ct. 337. The Supreme Court has found spontaneous declaration firmly rooted, for example, because the exception "is at least two centuries old, currently widely accepted among the States," and carries "substantial guarantees of ... trustworthiness ... [that] cannot be recaptured even by later in-court testimony." *White v. Illinois*, 502 U.S. 346, 355-56 n. 8, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carry special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony. *Id.* at 356, 112 S.Ct. 736.

*33 This Court has found, on several occasions, that *a statement against penal interest is not a firmly rooted hearsay exception*, at least insofar as the exception is used to admit a declarant's mutually inculpatory statement against a criminal defendant. *See Hill*, 337 F.3d at 715-16 (finding state court's reliance on a statement against penal interest as a clearly established hearsay exception "contrary to" clearly established federal law); *see also United States v. McCleskey*, 228 F.3d 640, 644 (6th Cir.2000) ("[I]t is clear that Supreme Court Confrontation Clause jurisprudence does not permit the introduction of hearsay declarations uttered by accomplices in law enforcement custody that inculpate a defendant, absent further 'particularized guarantees' of the declaration's trustworthiness."). *Compare Calvert v. Wilson*, 288 F.3d 823, 837-38 (6th Cir.2002) (finding a declarant's mutually inculpatory statement inadmissible against a third-party criminal defendant), *with Neuman v. Rivers*, 125 F.3d 315, 319-20 (6th Cir.1997) (finding statements against penal interest firmly rooted *when admitted against the declarant*). Moreover, this Court has found that it was clearly established, prior to the Supreme Court's 1999 *Lilly* decision, that such statements were not firmly rooted hearsay exceptions in light of the Supreme Court's precedents in *Douglas* (1965), *Bruton* (1968), and *Lee* (1990). *See Hill*, 337 F.3d at 715-16. Even were this Court to get past Kentucky's application of the *Taylor* factors and apply the deferential AEDPA standard of review, then, Respondent's argument would still fail because admitting an inculpatory statement, not against the declarant, but against an accomplice, was "contrary to" clearly established Supreme Court precedent in 1996.

2. Ash's Statement Bore Insufficient Indicia of Reliability

The Supreme Court of Kentucky found Ash's statement reliable in light of:
1) the timing of the declaration (shortly after the crime) and the party to whom it was made (the police),
2) the fact that the police found the key where Ash indicated it would be,
3) Petitioner's accomplice at trial corroborated Ash's version of the key request,
4) the actual crime scene, which would corroborate that Petitioner would have had blood on his clothes; and
5) that the statement was assuredly "against Ash's penal interest," inasmuch as she was in a custodial setting, had been read her *Miranda* rights, was aware that the police were investigating a murder, and would have known her actions, as disclosed to the police, helped Petitioner dispose of the fruits of a crime and evidence.

Of these elements, items 2 through 4 are impermissible considerations under *Roberts*, *Lee*,

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and *Wright*; rather, the only *inherent* features of the statement to which the Supreme Court of Kentucky pointed are the timing of the declarations, the facts that the statements were made to the police, and that parts of the statement inculpated Ash herself.

*34 The first two factors actually *caution against* finding Ash's statements inherently trustworthy. The Supreme Court has found that custodial statements made in response to the police's leading questions, when the declarant is under some suspicion related to the crime under investigation, are *inherently untrustworthy*. *See Lee*, 476 U.S. at 544, 106 S.Ct. 2056. Neither has the Supreme Court found the timing of a statement itself a sufficient indicator of reliability. *Id.* In fact, most accomplices are interviewed shortly after the crime. Here, about 10 days had passed. The fact that the statement was against Ash's penal interest does not distinguish the case from the Supreme Court's well-established jurisprudence finding that such custodial, mutually inculpatory statements are inherently untrustworthy. *Id.*

Nothing about Ash's statement bore "particular guarantees of reliability." The fact that a statement took place shortly after the crime is insufficient, standing alone, to overcome the presumption of unreliability accorded to statements which both inculpate the declarant and the criminal defendant in the same crime. Ash's statement did exactly what the Supreme Court fears such statements do-at the cost of some inculpability of the declarant, the declarant curries police favor, minimizes her own role, and inculpates another actor. *Id.* at 546, 106 S.Ct. 2056. This suspicion is borne out in Ash's case. At the conclusion of her statement, the police assured Ash that she was not being looked upon as a suspect in the case-despite the fact that the police had placed Ash in custody and Mirandized her for questioning. (*See* J.A. at 57.) Ash was incentivized to tell the police what they wanted to hear. The Supreme Court of Kentucky pointed to no features of Ash's statement which would indicate that the statement bore "particularized guarantees of trustworthiness."

Respondent argues that Ash was not a codefendant to Petitioner, nor a true "accomplice" to Petitioner's alleged crime, thereby placing Ash's statement outside the bounds of Supreme Court case law which treats such statements as presumptively unreliable. Respondent points out that destruction of evidence is a separate crime in Kentucky law, and that Ash's statements therefore implicate Ash in a different crime than Petitioner's. Respondent's argument in this respect is without merit. Whether Kentucky state law treats Ash's actions as a separate crime or as something akin to an "accomplice after the fact," the basic premise making Ash's statement presumptively unreliable remains. Ash had an incentive to minimize her actions and to curry favor with the police. Whatever the state of Kentucky ultimately chose to charge Ash with for her role in destroying evidence relevant to the death of Charlie Bramer does not affect the presumptive unreliability of her statement made just 10 days after the crime itself. Because the introduction of the statement was not harmless error, *see supra*, under the rule of *Ohio v. Roberts* the writ must be granted.

IV.

CONCLUSION

*35 Because *Crawford* is a watershed rule of criminal procedure, I would apply *Crawford* to find that the introduction of Ash's taped statement violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment. Even absent the application of *Crawford*, however, I agree with the lead opinion that the Kentucky *Taylor* test was contrary to clearly established law under *Ohio v. Roberts*. Accordingly, the writ must be granted.

FN* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

FN1. Kentucky's pre-1992 rules of evidence, including the marital privilege in Ky. Rev. Stat. Ann. § 421.210(1), *see*

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Slaven v. Commonwealth, 962 S.W.2d 845, 851 (Ky.1997), are carried forward for later trials of pre-1992 crimes by Kentucky Rule of Evidence 107(b) (2005).

FN2. *Taylor* requires courts considering the admissibility of hearsay statements against penal interest to examine: "(1)[t]he time of the declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is against the declarant's penal interest; and (4) the availability of a declarant as a witness." 821 S.W.2d at 74.

FN3. Fulcher does not put forth an argument under the "unreasonable application" clause.

FN4. Though this was a plurality opinion, it was nonetheless the opinion of the court, as the remaining two justices (Scalia and Thomas) believed that the Confrontation Clause barred a *broader* range of statements against penal interest than did the majority. *See Murillo v. Frank*, 402 F.3d 786, 791 (7th Cir.2005). Kentucky is wrong to suggest otherwise.

FN5. There is no reason to think that the Constitution demands equivalence in these tests. Defendants may very well have a Due Process right to introduce hearsay evidence in their defense that is *less reliable* than the evidence that prosecutors may introduce in their case in chief without violating the Confrontation Clause. Put differently, the Constitution may afford defendants greater protection from inculpatory hearsay evidence (under the Confrontation Clause) than it provides to the state by limiting the exculpatory hearsay evidence that defendants have a Due Process right to present in their defense.

FN6. *See supra*, note 2.

FN7. Remember that in the Kentucky courts, the state argued that Ash's statements were so *clearly* against her penal interest as to demonstrate their reliability. Because the constitutional test pushes in the opposite direction from the state's, Fulcher is able to co-opt the Kentucky court's adverse judgment below.

FN8. *See supra*.

FN9. Consider the following exchanges between Ash and Detective Jones. Regarding Fulcher and Wright's relationship:
Det. Jones: [S]o you was to say [sic] that Elem and Terry are pretty good friends among each other ... would that be a fair statement to say?
Ash: I'd say it was a fair statement, I mean ... I guess so ... I mean I wouldn't consider him one of Ray's best friends, if that's what you mean, no.
Det. Jones: But they pretty much hang out, hang around together?
Ash: Sometimes ... when Terry decides he wants to come around for awhile.
(J.A. 150.) And regarding when Fulcher asked her to wash his pants:
Det. Jones: Okay, do you remember what day that this was?
Ash: No I don't ... can't really. I, I know it was before the holidays, but I don't remember the date.
Det. Jones: Right before Christmas?
Ash: Around Christmas ...
(J.A. 143.)

FN10. *Cf Stapleton v. Wolfe*, 288 F.3d 863, 867-68 (6th Cir.2002). In *Stapleton*, there were three accomplices in a string of burglaries: Stapleton, Studer, and Foreman. Studer made several out-of-court statements inculpating Stapleton. In addition, Foreman testified at trial that Stapleton had played a substantial role. The trial court allowed Studer's statements to be admitted, which the Sixth Circuit held to violate Stapleton's confrontation

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right. The panel further found that the error was not harmless, *notwithstanding Foreman's testimony at trial*. The court rejected the state's arguments that Studer's statements were (a) unimportant, given Foreman's testimony; (b) cumulative, in light of Foreman's testimony; and (c) reliable, because they were corroborated by Foreman's testimony.

FN11. To this point, four other circuits have addressed whether *Crawford* applies retroactively to cases on collateral review. Three have held that it does not apply retroactively. *See Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir.2005) (April 1, 2005); *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir.2005) (April 7, 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir.2004); *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir.2004). One has held that it does. *See Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir.2005), amended in part by *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir.2005). In that one case a petition for a writ of certiorari was filed on November 7, 2005 and currently pends. *See* 2005 WL 3038541.

FN1. In fact, this is just the sort of " drive-by" "holding" that Justice Scalia has decried as meriting no precedential value, although sometimes understandable in light of the particular facts before the issuing panel. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating that a prior court's summary assumption of jurisdiction without analytical support held no precedential effect and indicating that such treatments are dicta).

FN2. The First Circuit declined to reach the question of *Crawford* 's retroactivity in *Horton v. Allen* because the court there found that the statements at issue did not implicate *Crawford* in the first instance. *See* 370 F.3d 75, 83 (2004). In setting up its analysis, however, the First Circuit implied that AEDPA would not preclude retroactive application when the court stated that "new rules of criminal procedure " applied in habeas cases when such rules fell within a *Teague* exception. *Id.*

FN3. The central issue guiding the applicability of *Crawford* would be whether or not the statement was testimonial. While the *Crawford* Court declined to define the boundaries of testimonial statements, it held that a "core" class of testimonial statements includes " custodial examinations," which the parties do not dispute was the circumstance of Ash's statement. *Crawford*, 124 S.Ct. at 1364.

FN4. *Crawley v. Commonwealth*, 568 S.W.2d 927 (Ky.1978).

FN5. Respondent appears to argue that the *Taylor* decision is consistent with Supreme Court precedent if read as setting forth a test to determine whether a statement actually is a statement against penal interest, and that such statements are, in turn, firmly rooted hearsay exceptions. Respondent does, in fact, imply in its brief to this Court that the *Wright* decision is inapplicable because the *Wright* court was dealing with the admissibility of a statement under the residual hearsay exception. (*See* Resp. Br. 25.) This argument fails for two reasons. First, whether admitted as either a statement against penal interest or under the residual exception, a declaration must pass the test set forth in *Ohio v. Roberts* (*see infra*) to preclude a Confrontation Clause violation. A statement can only pass *Roberts* if it 1) is a firmly rooted hearsay exception (and hence so traditionally trustworthy that individual case analysis is unnecessary), or 2) possesses its own particularized indicia of reliability. A statement against penal interest was not a firmly rooted hearsay exception in 1996, *see infra;* therefore such statements must be analyzed under

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Roberts' second prong, making applicable the 1990 *Wright* decision, which analyzed the admitted statement under *Roberts* ' second prong. Second, the *Taylor* test, *a fortiori*, purports to set forth an analysis of when a statement against penal interest is trustworthy enough to merit admission without Confrontation Clause problems, both because of the posture of the case and the test itself, which includes consideration of the declarant's penal interest as only *one factor* in the overall test.

FN6. The *Wright* decision came out on June 25, 1990, while the Kentucky *Taylor* decision came more than two months later, on June 27, 1990.

FN7. While the Supreme Court cited to *Wright* several times in decisions issued between 1990 and 1995, no majority opinion called the *Wright* decision into question.

FN8. In *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) , the Supreme Court held that the admission of a nontestifying accomplice's confession, which shifted responsibility and implicated the defendant as the triggerman, "plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause." *Id.* at 419, 85 S.Ct. 1074. A quarter century later, in *Lee*, the Court reaffirmed *Douglas* and explained that "the truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination .... Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee*, 476 U.S. at 544, 106 S.Ct. 2056 (internal quotations and citations omitted). The *Lee* Court recognized that due to the sweeping scope of the label, the simple categorization of a statement as a " 'declaration against penal interest' ... defines too large a class for meaningful Confrontation Clause analysis." *Id.* at 544 n. 5, 106 S.Ct. 2056.

FN9. In *Bruton v. United States*, the Supreme Court unanimously found that a codefendant's mutually inculpatory confession could not be used against the declarant's accomplice without infringing on the defendant's rights under the Confrontation Clause. 391 U.S. at 138, 88 S.Ct. 1620. In the years since *Bruton*, the Supreme Court has consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person. *See Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) ("Where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand."); *Cruz v. New York*, 481 U.S. 186, 189-90, 193, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) (same).

FN10. The "against penal interest" exception to the hearsay rule is not premised on the traditional hearsay exception rationale; circumstances of the traditional hearsay exception indicate that it is made without a motive to reflect on the legal consequences of one's statement; and the situations in which the statement is made are exceptionally conducive to veracity and lack the dangers of inaccuracy that typically accompany hearsay. Rather, the "against penal interest" exception is founded on the broad assumption "that a person is unlikely to fabricate a statement against his own interest at the time it is made." *Chambers*, 410 U.S. at 299, 93 S.Ct. 1038. But this rationale does not suppose that the declarant's unwillingness to inculpate himself extends to his accomplices or those who otherwise

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> assisted or engaged in the crime. The practice of admitting mutually inculpatory hearsay statements is a relatively recent phenomenon of the past two decades. The reality of such statements, however, is that they typically include statements that, when offered in the absence of the declarant, function similarly to those used in the ancient *ex parte* affidavit system which the hearsay rule was designed to address.

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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Dated June 1, 2005 . . . . . JA 211

Ninth Circuit Order Denying Rehearing En Banc
Dated August 11, 2005 . . . . . JA 213

RELEVANT DOCKET ENTRIES

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

02-15866

10/16/02 Filed Order (Ferdinand F. FERNANDEZ, Susan P. GRABER,) The mtn to broaden the COA is GRANTED.....(Pls see order for complete text) Aplt's mtn for appointment of csl is GRANTED. Csl will be appt'd by separate order. The Clk shall serve a copy of this order on Colleen Rosenkrantz, CJA Designee, USDC, District of NV, 400 S. Virginia St, Ste 301, Reno, NV 89501, who will locate appt'd csl. The DC shall provide the Clk of this ct with the name and address of appt'd csl within 14 days of locating csl. The briefing schedule is set as follows: Aplt's opening brf is due 12/13/02; aple's ans brf is due 1/17/03; and the optional reply brf is due within 14 days after svc of the ans brf. All remaining outstanding mtns are denied. [02-15866] (af)

3/24/03 Filed Original and 15 copies Appellant Marvin Howard Bockting opening brief (Informal: no) 39 pages and five excerpts of record in 2 volumes; served on 3/21/03. [02-15866] (af)

5/7/03 Filed Original and 15 copies appellee Robert Bayer's 42 pages brief, 5 Sup Excertps of Record in 1 vol; served on 5/5/03. [02-15866] (af)

6/9/03 Filed Original and 15 copies Marvin Howard Bockting reply brief (Informal: no) 15 pages; served on 6/5/03. [02-15866] (af)

1/14/04 ARGUED AND SUBMITTED TO J. C. WALLACE, John T. NOONAN, M. M. McKEOWN [02-15866] (gva)

4/1/04 Filed Order (J. C. WALLACE, John T. NOONAN, M. M. McKEOWN,) The parties are directed to file, within twenty-eight (28) days from the date of this order, simultaneous brfs of not more than twenty (20) pages responding to the following questions: (1) Should this ct apply Crawford's new constitutional rule retroactively to Bockting's collateral proceedings? (cite) (2) Which, if any, of the hearsay accusations admitted at trial are admissible under Crawford? (3) Assuming a Confrontation Clause violation occurred, should this ct consider the error harmless and affirm the denial of petition? (4) Should the petition be remanded to state ct for reconsideration in light of Crawford? (served to PANEL; phoned and faxed to all parties) [02-15866] (af)

4/29/04 Filed Original and 15 copies Aplt Marvin Howard Bockting supp brief of 14 pages, served on 4/28/04. (Fedex to PANEL) [02-15866] (af)

5/3/04 Filed Original and 15 copies Aple Robert Bayer supplemental brief of 16 pages, served on 4/29/04. (Fedex to PANEL) [02-15866] (af)

2/22/05 FILED (VOLUME 1 & 2) OPINION: Bockting's petition for a writ of habeas corpus is GRANTED. (Terminated on the Merits after Oral Hearing; Granted; Written, Signed, Published. J. C. WALLACE, partial concurrencing and partial dissenting; John T. NOONAN, concurring; M. M. McKEOWN, author.) FILED AND ENTERED JUDGMENT. [02-15866] (af)

3/3/05 Filed Original and 50 copies Aple Robert Bayer petition for panel rehearing and petition for rehearing en banc in 20 pgs; served on 3/2/05. (total of 4,188 words) (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [02-15866] (af)

4/14/05 Filed Aplt Marvin Howard Bockting's opposition to aple's petition for rehearing and suggestion for rehearing en banc; served on 4/13/05. (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [02-15866] (af)

6/1/05 Filed (IN 2 VOLS) order and amended opinion (Judges J. C.WALLACE, concurring in part and dissenting in part, John T. NOONAN, concurring, M. M. McKEOWN, author) (Orig. opinion id: [5337347-1]) The opinion filed Feb 22, 2005, (cite), is amended as follows: (Pls see opinion for complete text) The petition for panel rehearing is DENIED. THE PETITION FOR REHEARING EN BANC IS PENDING BEFORE THE COURT. NO FURTHER PETITIONS MAY BE FILED. Bockting's petition for a writ of habeas corpus is GRANTED. [02-15866] (af)

8/11/05	Filed order (J. C. WALLACE, John T. NOONAN, M. M. McKEOWN,): The pet for rhrg en banc is DENIED. (See order for complete text) [02-15866] (mhf)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA (RENO)

CASE # 3:98-cv-00764-ECR-VPC

Date Filed #	Docket Text
04/06/1999	7 PETITION FOR WRIT OF HABEAS CORPUS obo P (Entered: 02/10/2003)
07/09/1999	13 MOTION TO DISMISS petition w/h/c obo Rs. (m) (Entered: 02/10/2003)
07/09/1999	12 ORDER Rs mtn (#11) granted. Rs sh fl rspn/anser by 7/12/99. mld 7/9/99 (Entered: 02/10/2003)
08/26/1999	16 RESPONSE IN OPPOSITION TO MOTION to mtn to dism pet w/h/c (#13) obo P. (m) (Entered: 02/10/2003)
10/12/1999	17 ORDER Rs mtn to dism (#13) is granted. CLk sh snd P a 2254 w/instrc. P has 30 day frm dt ord enterd to fl amnd petn. See ord for spfcs. EOD 10/13/99. mld 10/13/99 (Entered: 02/10/2003)
10/29/1999	18 NOTICE OF APPEAL as to ord (#17) obo P. (no fees pd) (m) (Entered: 02/10/2003)
11/03/1999	20 ORDER P has fld a ntc of appl wh will be trated as a mtn for cert of appealability. Said mtn is denied. (See ord for spfcs) mld 11/4/99 (Entered: 02/10/2003)

11/16/1999	24	ORDER mtn to vol w/d ntc of appl (#23) is granted. Mtn for enlargment (#22) is granted. P hv til 12/12/99 to fl amnd pet. mld 11/16/99 (Entered: 02/10/2003)
12/06/1999	25	PETITION FOR WRIT OF HABEAS CORPUS obo P (Entered: 02/10/2003)
03/13/2000	29	ANSWER TO COMPLAINT to 1st amnd pet (#25) obo Rs. (Entered: 02/10/2003)
05/17/2000	35	PETITION FOR WRIT OF HABEAS CORPUS 2d obo P (Entered: 02/10/2003)
04/30/2001	37	MOTION TO DISMISS 2nd amended petn for W/H/C (#35) obo Rs. (m) (Entered: 02/10/2003)
06/13/2001	40	RESPONSE TO MOTION to Rs mtn to dism 2nd amended petn for W/H/C (#37) obo P. (m) (Entered: 02/10/2003)
01/14/2002	41	ORDER Rs mtn to dism (#37) is granted. P shl hv 14 days to inform Crt by declaratn tht he wishes to either (1) formally abandon the 2 unexhausted 6th amendmnt clms & proceed only on the remaining fully exhausted clms or (2) vol dism entire petn. Rs shl hv (Entered: 02/10/2003)
02/13/2002	43	ANSWER TO COMPLAINT to 2nd amended petn (#35) obo Rs. (m) (Entered: 02/10/2003)

03/19/2002	45	ORDER tht petner's 2nd am petn for writ of H/C (#35) is denied. The Clerk shl enter jdgmnt in Rs' fav & agnst the petner. (Entered: 02/10/2003)
03/21/2002	46	JUDGMENT entered in fav of Rs & agnst petner. (Entered: 02/10/2003)
04/24/2002	47	NOTICE OF APPEAL as to ord (#45) obo P. (m) [No fees paid] (Entered: 02/10/2003)

JUSTICE COURT
LAS VEGAS TOWNSHIP
COUNTY OF CLARK
STATE OF NEVADA
PRELIMINARY HEARING

March 30, 1998

* * *

[p.28]

name?

THE WITNESS: B-o-c-k-k -

THE COURT: We have the spelling, continue on.

DIRECT EXAMINATION

BY MR. LUKENS:

Q. Hi, Autumn.

A. Hi.

Q. Do you remember me?

A. Yes.

Q. Do you remember we talked yesterday?

A. Yes.

Q. And do you remember one of the things we talked about was telling the truth and difference between the truth and a lie?

A. Yes.

Q. And that you know what the truth is, right?

A. Yes.

Q. And you know what a lie is?

A. Yes.

Q. If I held this pencil up and then I put the pencil behind my back and said, "I have a blue pencil behind my back," would that be the truth or a [p. 29] lie?

A. A lie.

Q. Okay. If I said, "I have a red pen behind my back," would that be the truth or would that be a lie?

A. A truth.

Q. Now, you know when you raised your hand and you promised to tell the truth, that that's what you have to tell the judge the truth, right?

A. Yes.

Q. Do you see your mommy present in court today?

A. Yes.

Q. Is your mommy here?

A. Yes.

Q. Would you point to her and just say what she's got on?

A. She's wearing a yellow shirt.

Q. And do you see your daddy present in court today?

A. Yes.

Q. And where is he?

A. (Witness pointing.)

Q. Could you say what he has on?

A. (No response.)

[p.30]

Q. What color is his shirt?

A. (No response.)

Q. Is it a white shirt?

A. Yes.

Q. And he's seated next to the fellow in the blue suit with the coat and tie?

A. Yes.

MR. LUKENS: Your Honor, may the record reflect she's identified the defendant.

THE COURT: So reflect.

BY MR. LUKENS:

Q. Do you call him daddy or J.R.?

A. J.R.

Q. Do you remember where you lived before you lived in Las Vegas?

A. Delta.

Q. Where is that, in Colorado?

A. Yes.

Q. Do you remember moving to Las Vegas?

A. Yes.

Q. When you came here, what school did you go to?

A. I don't remember.

Q. Do you remember what grade you're in?

A. Kindergarten.

[p.31]

Q. And you get good grades, don't you?

A. Yes.

Q. What do you get what you get good grades?

A. Star.

Q. Didn't you have a star the other day? You showed me your star.

A. Yeah.

Q. Now, do you know what your mommy does? Does your mommy go to school?

A. Yes.

Q. And when mommy goes to school, who takes care of you?

A. Susie.

Q. Okay. Does anybody else besides Susie take care of you?

A. Her husband Daniel and her boy Brian.

Q. Sometimes does your daddy take care of you?

A. No.

Q. Do you ever stay with your daddy while your mom goes to school?

A. No.

Q. Ever?

A. Huh-uh.

[p.32]

Q. Do you know what time of day your mommy goes to school? Does she go during the daylight hours or during the nighttime hours?

A. She goes in the morning.

Q. Oh, in the morning?

A. (Witness nods head.)

Q. Does your daddy ever baby-sit for you?

A. No.

Q. How many people are in your family?

A. Three. Two.

Q. Two?

A. (Witness nods head.)

Q. Who is in your family?

A. My little sister Honesty.

Q. And who else?

A. My mom.

Q. How about you? You're there too, aren't you?

A. (Witness nods head.)

Q. Did there ever come a time when your daddy touched you in a way that you didn't think he was supposed to touch you?

A. Yes.

MR. BLASKEY: Object. It's a little vague, your Honor. A spanking is a way in which –

[p.33]

MR. LUKENS: Your Honor, I'm entitled great latitude with the witness like this, and I'm certainly entitled – I don't think counsel expects me to make my case with that statement alone.

THE COURT: Continue on.

BY MR. LUKENS:

Q. Now, you said that there was a time when your daddy touched you that you didn't think he ought to touch you like that; is that right?

A. Yes.

Q. Do you remember when that was?

A. A long time ago.

Q. Do you remember, was your mommy there? Was your mommy there?

A. No.

Q. How about Honesty, was Honesty there?

A. Yes.

Q. Where was Honesty, in the same room with you?

A. No.

Q. Where was Honesty?

A. She was in the living room.

Q. And what room were you in?

A. In the bathroom.

Q. What happened when you were in the [p.34] bathroom?

A. (No response.)

Q. Do you remember whether or not you had any clothes on?

A. Yes.

Q. Did you have your clothes on?

A. Yes.

Q. Did there come a time when your daddy took your clothes off?

A. Yes.

Q. Did he take all your clothes off?

A. No.

Q. What part of your clothes did he leave on? Did he leave on your top?

A. Pants.

Q. He left on your pants?

A. (Witness nods head.)

Q. Did he ever take your pants down?

A. Huh-uh.

Q. He left them on the whole time?

A. (Witness nods head.)

Q. How did your daddy touch you?

A. I don't remember.

Q. Do you remember telling your mommy about it?

[p.35]

A. Yes.

Q. Do you remember telling a fellow named Chuck about it?

A. Yes.

Q. When you told them about it, did you remember then?

A. No.

Q. You remember telling them, don't you?

A. Yes.

Q. Do you remember what it was that you told them?

A. No.

Q. Do you remember going to the doctor sometime?

A. Yes.

Q. And do you remember, was the doctor a nice fellow?

A. Yes.

Q. And do you remember what the doctor did?

A. No.

Q. How long ago was that that you went to the doctor?

A. It was a couple of days ago.

Q. Did you go to the doctor a short time after your daddy had touched you?

[p.36]

A. I don't know.

Q. Do you know what your pee-pee is?

It's okay, Autumn.

THE COURT: Why don't you come up here and console her, will you?

MR. LUKENS: Your Honor, at this time, for purposes of preliminary hearing only, I'm going to ask that the Court declare the witness unavailable to testify for obvious reasons.

THE COURT: Just a minute. I'm going to have you, at this time, sit in the chair right next to her.

Autumn, honey, let me explain something to you. Okay? Your mommy is going to be sitting right there, right next to you. Okay? No one is going to hurt you. No one is going to hurt you, I promise you that. Do you understand that?

THE WITNESS: (Witness nods head.)

THE COURT: All we want and all I want is just for you to tell me the truth. Now, I know it may be hard, but it's necessary that you tell the truth.

Just tell me what happened and then after you tell me what happened, then you can go with your mommy and leave. Okay?

[p.37]

MRS. BOCKTING: The sooner you do it, the sooner we can go. Okay? Mom's right here.

THE COURT: You're a big girl. You're in school.

MRS. BOCKTING: Just answer the questions like Chuck asked you. Do you remember how you told Chuck everything? Just tell the truth. Okay? Mom's right here. I'll hold your hand. It's okay.

Crying's not going to do no good. Do you want to go? We have to get this over with. Do you want to go? We're going to be here all day. Just answer his questions. Just tell the truth only.

THE COURT: Will you do that, Autumn?

MRS. BOCKTING: Answer him.

THE WITNESS: I'll try.

THE COURT: Why don't you lift your head up now. Lift your head up. Do you see the man right in front of you here? Do you see this man right here? Now, he's going to ask you a few more questions, so please answer them.

BY MR. LUKENS:

Q. Autumn, do you remember when you were in the bathroom with your dad?

[p.38]

A. No.

Q. Do you remember when you talked to Chuck?

A. Yes.

Q. And do you remember you were able to tell Chuck that some things happened to you. Do you remember telling Chuck about those things?

A. Uh-huh.

Q. You remember that?

A. Yes.

Q. And Chuck's a nice fellow, isn't he?

A. Yes.

Q. Did you tell Chuck something about your daddy?

A. I don't remember.

Q. Do you remember telling your mom something about your daddy?

A. No.

Q. Do you remember your daddy ever saying anything to you that something bad would happen to you if you told?

A. No.

MR. LUKENS: Your Honor, I'm going to ask – well, the witness is obviously unavailable to testify this morning. I'm going to ask she been [p.39] excused and we will call Detective Zinovitch.

THE COURT: You won't answer the questions, Autumn? Autumn, let me ask you this, honey, are you afraid that if you tell the truth that your daddy will hurt you?

THE WITNESS: No.

THE COURT: Because there's no use being afraid of that. Why don't you want to answer the questions, Autumn?

THE WITNESS: I don't remember some of them.

MRS. BOCKTING: It's okay to talk about it. You know you can talk about anything you want. Why don't you just tell them what you told mommy happened, what you told Chuck?

MR. BLASKEY: Your Honor, I would rather not have the mother —

MRS. BOCKTING: Just be honest like when you told mommy and when you told Chuck, that's all you got to say. Just tell the truth.

THE WITNESS: You already told them.

MRS. BOCKTING: I know I already told them but they can't take my word for it, you have to tell them what happened. You have to be the one to tell them. They want to hear it from you.

[p.40]

Would you do that for mommy, please? Will you answer his questions?

THE WITNESS: I'll try.

THE COURT: We'll try one more time. Autumn, listen very carefully now to this man right here. He's going to ask you a few more questions. Please answer just you like you told your mommy and told Chuck. Okay?

THE WITNESS: (Witness nods head.)

BY MR. LUKENS:

Q. Do you remember what it was that you told your mommy?

A. No.

THE COURT: I'll declare her unavailable as a witness.

MR. LUKENS: Okay, Autumn, you can get down. That's okay.

Detective Zinovitch will be my next witness.

CHARLES ZINOVITCH,

having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. State your full name and spell your last name.

THE WITNESS: Charles Zinovitch. Z, as

* * *

EIGHTH JUDICIAL DISTRICT
COUNTY OF CLARK
STATE OF NEVADA
TRIAL TRANSCRIPT EXCERPTS
AUGUST 15, 1988-NOVEMBER 1, 1988

* * *

[p.13]

THE COURT: Very good. And the two young ladies we have, are they potential witnesses?

MR. LUKENS: No, Your Honor, they are not.

THE COURT: Mr. Lukens, you wish to give your opening remarks?

(Opening statements were had.)

THE COURT: Very good then. Mr. Lukens, your first witness.

MR. LUKENS: Autumn Bockting.

THE COURT: Mr. Bailiff, before you do, could counsel approach the bench, please. Mr. Bailiff, you could remove the lectern for us.

(Discussion at the bench which was not reported.)

MR. LUKENS: Your Honor, may I ask permission to examine Autumn from closer instead of from here?

THE COURT: Yes.

MR. LUKENS: Your Honor, may we take a short recess?

THE COURT: Yes.

(The admonition was read.)

THE COURT: The Court's in recess.

(Recess taken.)

THE COURT: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will [P.14] reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State, the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.

All right. Go ahead, counsel.

MR. LUKENS: Autumn, this is when you have to stand up to be sworn.

THE COURT: Can you stand up, Autumn? Can you stand up raise your hand for me? Autumn, stand up now and raise your hand for us, okay.

MR. LUKENS: Your Honor, I think under these conditions, I think that the witness is unable to testify.

THE COURT: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

MR. LUKENS: Your Honor, at this time since the Court has observed for itself the inability of Autumn Bockting to testify due to the emotional conflict that goes on within her, the State intends pursuant to NRS 51.385 to offer into evidence the statements made by Autumn Bockting to both her mother, Laura, and Detective Zinovitch and, to a more limited extent, Diane Donovan.

[p.15]

This offer is made pursuant to 51.385 which states in pertinent part that, "In addition to any other provision for admissibility, a statement made by a child under the age of 10 years, describing any act of sexual conduct performed with or on the child, is admissible in a criminal proceeding regarding that sexual conduct if, A, the Court finds in hearing outside the presence of the jury that the time, content and circumstances of the statement provides sufficient circumstantial guarantees of trustworthiness, and, B, the child "testifies at the proceeding or is unavailable or unable to testify." I submit that portion B has been met.

And, in addition, under Subsection 2, it says, "If the child is unavailable or unable to testify, written notice must be given to the defendant 10 days before the trial if the prosecution intends to offer the statements in evidence."

I would submit that the State has complied with that and that such notice was filed on August 2nd, 1988 and is styled Notice Pursuant to NRS 51.385 wherein I gave notice

of the three individuals who I intend to call as to Autumn's statements.

THE COURT: Very well. Mr. Blaskey.

MR. BLASKEY: Thank you, Your Honor. I will be objecting to this testimony at this time. I would like leave of the Court to file in open court points and authorities in opposition to this testimony being presented.

[p.16]

THE COURT: Have you a copy for counsel?

MR. BLASKEY: Yes, I do have one. I will hand it to him at this time.

THE COURT: Court will allow you to file that document.

MR. BLASKEY: Your Honor, I have two major objections to this testimony. I will just point them out to Your Honor at this time, just the issues involved.

One is that since the daughter, Autumn, is not testifying, that under the new Supreme Court decision of Coy versus Iowa allowing this hearsay testimony would be a violation of the confrontation clause of the sixth amendment.

And, also, we would submit at the end of the hearing that the testimony is unreliable due to Autumn's previous testimony at the preliminary hearing, but I will save that argument until after the testimony has been presented for you to hear.

THE COURT: Very good then. Mr. Lukens, your first witness then outside the presence of the jury?

MR. LUKENS: Will be the child's mother, Laura Bockting.

Your Honor, I am only going into the circumstances surrounding the statement of when disclosure was made for the purposes of the hearing.

THE COURT: I think it might be well that we are

* * *

[p. 54]

RECROSS-EXAMINATION

BY MR. BLASKEY:

Q. Were you actually present when he made that statement?

A. Yes, I was.

MR. BLASKEY: Thank you. No further questions.

THE COURT: All right. Thank you very much. You are excused. Next witness.

MR. LUKENS: I can't see because of the glare of the lights. May I ask if the Court intends to go on past five?

THE COURT: No.

MR. LUKENS: Diane Donovan.

THE COURT: Very good.

DIANE DONOVAN,

was called as a witness on behalf of the State and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUKENS:

Q. Would you state your name, please?

A. I don't know if I can talk. Diane Donovan.

Q. And what is your business address, Mrs. Donovan?

A. 526 South Seventh Street.

Q. And what business is that at, that address?

[p.55]

A. Center for Interpersonal Studies.

Q. How are you employed?

A. I am a self-employed marriage and family therapist.

Q. Did you have to go to school to become a marriage and family therapist?

A. Yes.

Q. And where did you go to undergraduate school?

A. UNLV?

Q. And when did you graduate from undergraduate school at UNLV?

A. 1983.

Q. And what was your degree in?

A. Sociology.

Q. And after you attained -- that is a bachelor's degree?

A. Yes, sir.

Q. After you attained your bachelor's degree in sociology, did you continue with your education?

A. Yes, I did.

Q. And in what area did you continue on with your education?

A. Marriage and family therapy.

Q. And did you obtain a degree in that?

A. Yes, I did.

Q. What degree did you obtain in that?

[p.56]

A. Masters degree.

Q. And so when did you obtain your masters degree in that?

A. 1985.

Q. In connection with being a marriage and family counselor, do you ever counsel the victims of sexual abuse or child sexual abuse?

A. Yes, I do. When I was working on my internship, I worked for a year for Parents United running a pre-teens group for them.

Q. What is Parents United?

A. It is a sexual abuse treatment program.

Q. Sponsored by whom, for whom and where is it? Tell us a little bit about it.

A. Not sure who sponsored it. Sara Beards was running it, I believe the families -- it is a self-help group for families. Local therapists come in and volunteer services to run groups.

Q. Geared toward what type of problems?

A. Sexual abuse treatment.

Q. Sexual abuse; intrafamilial sexual abuse?

A. Yes, within families. They have mothers' groups, groups for the victims, groups for the perpetrators and I believe they have some mother-daughter groups and family groups.

[p.57]

Q. So that for more than a year while you were doing your internship, I believe you said that you were connected with this group?

A. Yes.

Q. Now, since you have -- do you have any licenses by the State to do what you do?

A. I am licensed under the marriage and family board, certified marriage and family counselor.

Q. You hold any other licenses, also?

A. Certified substance abuse counselor with the Bureau of Alcohol and Drug Abuse.

Q. What has your experience been since your graduation? Well, let's ask you: Have you consistently worked with victims of sexual abuse and child sexual abuse?

A. Yes. I am on the referral for Rape Crisis and I receive sexual abuse clients where I work in my office. They are usually referred to me.

Q. In that capacity, did you have occasion to meet a little girl named Autumn Bockting?

A. Yes, I did.

Q. Do you remember approximately when it was that you first met Autumn?

A. I believe it was Match.

Q. Of this year?

A. Of this year.

[p.58]

Q. Why did Autumn come in to see you?

A. Autumn was referred in by Rape Crisis under the Victims Assistance Program to receive therapy for sexual abuse treatment along with her mother.

Q. During that period of time of March of 1988, how often did you see Autumn?

A. I saw her once a week for an hour.

Q. When you saw Autumn, was anyone else with her during these meetings?

A. Her mother.

Q. Was her mother present during the entire meeting, for all of the meetings?

A. No.

Q. Describe how these meetings -- what would happen at these meetings?

A. I would talk to Autumn. Autumn and I would play with my stuffed animals or I have some toys we would play with and she would draw pictures for me that I would ask her to draw and then --

Q. Was her mother always present or never present?

A. No. Her mother was not present when I was playing with her. And when her mother would be present, oh, for a few minutes during the beginning of the session and then her mother sometimes I would talk to her alone while Autumn was drawing.

[p.59]

Q. So primarily these were periods of time of interaction between you and Autumn individually; is that correct?

A. Yes.

Q. Now, when Autumn came to see you, you were aware of why Autumn was there; is that right?

A. Yes.

Q. And you were aware of the allegations that had been made against Autumn's stepfather; is that correct?

A Yes.

Q. Do you have an opinion as to whether or not Autumn's behavior was consistent with having been sexually assaulted?

MR. BLASKEY: I am going to object, Your Honor. That is outside her scope, invading the province of the jury at this time.

MR. LUKENS: If Your Honor wishes me to address this before the jury, there is a specific statute on point that allows someone in this area to state that. And notice I prefaced her behavior, because it also allows mental condition, because that is going to be the next question, to allow the person to testify, the expert to testify, that the victim's mental condition or behavior is consistent with having been sexually assaulted.

THE COURT: All right. Mr. Blaskey, are you familiar with that area of law?

[p.60]

MR. BLASKEY : No, Your Honor. I don't know the exact statute.

THE COURT: Do you happen to have it, Mr. Lukens, so Mr. Blaskey can review it?

MR. LUKENS: NRS 50.345, expert testimony to show victim's behavior or condition is consistent with the behavior, condition of a victim of sexual assault.

THE COURT: Miss Donovan, is it Miss or Mrs.?

THE WITNESS: Miss.

THE COURT: Do you consider yourself expert in this area?

THE WITNESS: More expert than a lay person definitely. I have worked with victims for over two years.

THE COURT: Have you had any form of training in this particular situation?

THE WITNESS: Yes. I have attended continuing education workshops and I took special training during my masters program. And Parents United offers training like an in-service training while we do the therapy. And as an intern, I had two years of training under a supervisor who also worked with these issues.

THE COURT: When you say these issues, are we speaking of young children that have allegedly been abused sexually?

WITNESS: Yes, sexual abuse victims, young [p.61] children through adulthood.

THE COURT: All right. I will allow limited inquiry here.

MR. LUKENS: Thank you.

Q. Mrs. Donovan, I ask you: Do you have an opinion after working with Autumn as to whether or not her behavior is consistent with the behavior of a victim of sexual assault?

A. Yes. I believe her behavior is consistent with a sexual assault victim.

Q. Do you have an opinion as to whether or not her mental condition at the time that you worked with Autumn is consistent with the condition of a victim of sexual assault?

A. Yes.

Q. What is that opinion?

A. I believe that she does have -- could you repeat it? I am sorry.

Q. It was a two-prong question. The first question dealt with her behavior. The next one deals with her mental condition and whether or not that mental condition is consistent with the mental condition of a victim of sexual assault.

A. I believe that Autumn is in denial at this point in time. Her behavior is consistent with denial.

Q. When you say her behavior is consistent with denial, [p.62] what do you mean? What is denial and what do you mean?

A. Denial is like a defense mechanism that the mind is using to help the victim cope with the trauma. Autumn appears not to want to deal with the sexual abuse. She doesn't want to talk about it. She doesn't want to acknowledge that it happened.

She is -- it appears that she is in self-protecting mode of thinking and she -- as long as she's -- as long as she's denying, she doesn't have to feel the trauma that she underwent and that is the way she appears to me.

MR. LUKENS: I have no further questions, Your Honor.

THE COURT: Cross-examination, Mr. Blaskey.

MR. BLASKEY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BLASKEY:

Q. Is it Miss Donovan or Mrs.?

A. Miss.

Q. Miss Donovan, you understand that when Autumn came to see you those were just allegations that were made against her father; isn't that correct?

A. No, sir.

Q. She went to see you because someone referred her to you; is that correct?

[p.63]

A. Yes.

Q. And in reference to you they said she might have been sexually assaulted; is that correct?

A. I don't know. Usually I don't go into that.

Q. Now, you say that her behavior and her mental condition is consistent with someone who has been sexually assaulted; is that correct?

A. Yes.

Q. Now, you did not see any sexual assaults take place between Marvin and Autumn, did you?

A. No, definitely not.

Q. And you never asked Marvin his side of the story about what had happened, did you?

A. No.

Q. And, in fact, you never even talked to him at any point, have you?

A. No.

MR. BLASKEY: I have no further questions.

THE COURT: Redirect.

MR. LUKENS: No redirect, Your Honor.

THE COURT: Miss Donovan, you are excused. Thank you very much. Counsel, I think we might have a brief recess.

MR. LUKENS: My remaining witness for the day is the mother, Laura Bockting.

* * *

SUPREME COURT OF NEVADA

No. 19524

[Filed June 22, 1989]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

ORDER DISMISSING APPEAL

Appellant Marvin Howard Bockting was charged with sexual assault on his six-year-old stepdaughter. During the preliminary hearing and at trial, the victim did not cooperate in answering questions about the assault. Thus, the judge invoked NRS 51.385(1)[1] which permits the child's hearsay

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[1] NRS 51.385(1) provides as follows:

> 1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing the act of sexual conduct performed with or on the child is admissible in a criminal proceedings regarding that sexual conduct if the:
>
> (a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

statements concerning the assault to be admitted into evidence. The victim's mother and a police detective both testified that the victim had told them about Bockting's assault.

Bockting claims that NRS 51.385(1) is unconstitutional because the United States Supreme Court ruled in *Coy v. Iowa*, ___ U.S. ___, 108 S. Ct. 2798 (1988), that the confrontation clause gives the defendant the right to confront witnesses face-to-face. While there are some similarities between *Coy* and the instant case, the procedure used in this case did not violate Bockting's sixth amendment rights.

The Supreme Court's holding in *Coy* is narrow. The Court found that the Iowa statute in question made only a generalized finding -- "a legislatively imposed presumption" -- that not allowing the child victim to see the defendant would be in the best interest of the child. The Court then held that "something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* at 2803 (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

The legislature does not make a "generalized finding" that not having the child victim testify is in the best interest of the child. Instead, the statute provides for a hearing out of the presence of the jury to determine if the hearsay testimony is trustworthy and if the child is unavailable or unable to testify. Only upon making these findings may a court admit into evidence the out-of-court declarations of a child victim. This

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(b) Child either testifies at the proceeding or is unavailable or unable to testify.

procedure specifically comports with the Supreme Court's requirements for admitting hearsay evidence in a criminal proceeding: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

The district court in this case found that the victim was unavailable as a witness and found that the hearsay evidence was reliable. Since proper admission of hearsay evidence has long been held not to be a violation of the confrontation clause, we do not agree with Bockting that NRS 51.385(1), allowing admission of out-of-court statements by child victims, is unconstitutional when measured against the confrontation clause of the sixth amendment.

We also conclude that Bockting was not prejudiced by the violation of the rule of exclusion when the court allowed the victim's mother to remain in the courtroom while the victim testified. The record clearly shows that the testimony of the victim's mother was the same before and after she heard what little the victim had to say in the preliminary hearing. *See Givens v. State*, 99 Nev. 50, 657 P.2d 97 (1983).

Having decided that all of Bockting's contentions on appeal lack merit, we

ORDER this appeal dismissed.

/s/ _____
Young, C. J.

/s/ _____
Steffen, J.

/s/ _____
Springer, J.

/s/ _____
Mowbray, J.

/s/ _____
Rose, J.

SUPREME COURT OF THE UNITED STATES

No. 89-5396

[Filed June 28, 1990]

Marving Howard BOCKTING Petitioner	)
v.	)
NEVADA	)

On Petition for Writ of Certiorari
to the Supreme Court of Nevada

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy.

OPINION

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Nevada for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

SUPREME COURT OF NEVADA

No. 19524

[Filed March 8, 1993]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Remand from United States Supreme Court after vacating prior order dismissing appeal, ordering further consideration of an appeal from a conviction of three counts of sexual assault on a minor under the age of fourteen years. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Affirmed.

JUDGES: Rose, C.J., Steffen, J., Young, J., Springer, J.

OPINION

PER CURIAM:

Appellant Marvin Howard Bockting was arrested and charged with four counts of sexual assault on his six-year-old stepdaughter: counts I and II, forcing vaginal and anal intercourse upon the child; count III, compelling the victim to perform fellatio upon him; and count IV, forcing the child to

submit to cunnilingus. Bockting was convicted on Counts I, II and III.

Bockting appealed to this court, contending that his constitutional right to confront adverse witnesses had been denied. More specifically, Bockting insisted that he was deprived of his right to cross-examine his stepdaughter because unreliable hearsay statements attributed to her were admitted into evidence pursuant to NRS 51.385. Concluding that Bockting's arguments were meritless, we ordered the appeal dismissed.

Bockting successfully petitioned the United States Supreme Court for a writ of certiorari. After vacating this court's order dismissing appeal, the Supreme Court remanded Bockting's appeal to us for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

FACTS

Bockting and the child victim's mother, Laura, were married in early 1984. Eventually the couple, Laura's daughter, and a child born to Bockting and Laura, made their way to Las Vegas, where they obtained one-bedroom accommodations in a hotel. Bockting worked as a handyman at various jobs during the day and took care of the children at night while Laura attended business college.

On Saturday evening, January 16, 1987, while Bockting was away, his stepdaughter woke up frightened and sobbing. Despite prior threats by Bockting that he would "beat her butt" and that "mom would make dad leave," the

stepdaughter eventually told her mother about the sexual attacks she had suffered at the hands of Bockting.[1]

Laura asked her daughter when these activities occurred and the child said it happened a lot and that the last occurrence was while the child's mother was in school. Because the disclosures were made after Laura had been in school for only one week, the last incident must have transpired within that week.

On Tuesday, January 19, 1987, Laura took her daughter to the hospital, where Dr. Stacy Rivers, a gynecologist and obstetrician, examined the child under a general anesthetic. The examination by Dr. Rivers revealed a tear in the rectal sphincter and a wide opening in the hymenal ring.

Detective Charles Zinovitch attempted to question the visibly distraught child at the hospital, but because she was so upset, her only response was that someone had hurt her. Two days later, however, Detective Zinovitch was able to effectively communicate with the victim at his office. There, in a room specially designed to enable children to feel comfortable and at ease while being interviewed, the child gave the detective the same information she had conveyed to her mother. Detective Zinovitch asked the girl various questions to determine the consistency and authenticity of her

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[1] After being reassured by her mother, the young victim explained that Bockting had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," and that "he put his chin on her pee-pee."

statements.[2] The child's third recitation of the events occurred when she demonstrated the incidents with the use of anatomically correct dolls. Her depiction of the acts reflected "correct" positioning of the dolls, representing Bockting and herself during the various sexual acts, as well as correct placement of the doll's genitalia.[3] Subsequent to the interview, Bockting was arrested and charged with four counts of sexual assault.

At the preliminary hearing, the prosecutor questioned the child concerning the incidents with Bockting. She was able to describe the surroundings, but stated that her pants were never removed and that she could not remember how Bockting touched her. She testified that she remembered talking to her mother and Detective Zinovitch, but could not remember what she told them. The judge asked Laura to accompany her daughter on the stand in an effort to enable the child to respond to questions. The effort proved futile,

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[2] When asked what was meant by her "pee-pee," the child responded by pointing between her legs. Similarly, when asked where a man's "pee-pee" was, she said it was between his legs. When discussing in child's terms the subject of fellatio, she descriptively stated that "white bubbly stuff came out of Bockting's pee-pee" and went into her mouth.

[3] Near the outset of the interview, Detective Zinovitch told the child that he might show her some dolls, but made no mention of the nature of the dolls. After the child had been able to describe to the detective what had happened to her, and the detective had thus heard all that he felt was necessary for a complete interview, the child asked if she could then see the dolls. In response, the detective produced the anatomically correct dolls, and the child was able to select the adult male doll and the "little girl" doll, and thereafter demonstrate to the detective through use of the two dolls what Bockting had done to her.

however, and the judge declared the child unavailable as a witness.

At trial, a hearing was held outside the presence of the jury where the six-year-old child was called to the stand and was uncommunicative when requested to take the oath. Efforts to persuade her to cooperate were of no avail and the judge, at the request of the prosecutor, declared the child unavailable for purposes of testifying. The prosecutor then attempted to have the child's hearsay statements to her mother and Detective Zinovitch admitted pursuant to NRS 51.385. The prosecutor had earlier supplied the defendant with the statutorily required notice of the State's intention to have the hearsay statements introduced at trial.

At the hearing mandated by NRS 51.385(1)(a), the victim's mother and Detective Zinovitch testified concerning the child's statements to them and the circumstances under which the statements were made. The court admitted the hearsay statements--as well as the victim's inconsistent statements made at the preliminary hearing--based upon the terminology, rationality, plausibility and consistency of the statements made to the mother and the detective.

DISCUSSION

When this court first reviewed Bockting's appeal challenging the admissibility of the victim's hearsay statements to her mother and the investigating officer, we concluded from the record that the district court did not err in ruling that the child victim was unavailable as a witness and that the hearsay evidence was reliable. We therefore dismissed Bockting's appeal as meritless. Upon remand from the United States Supreme Court, we have reconsidered our prior ruling in light of *Idaho v. Wright*, 497 U.S. 805, 110 S.

Ct. 3139, 111 L. Ed. 2d 638 (1990), and are convinced that Bockting's convictions must again be affirmed.

The single issue before us concerns the delicate balance between the State's right at trial to introduce an unavailable[4] child victim's hearsay statements and a defendant's right of confrontation under the Sixth Amendment to the Federal Constitution. Directly implicated in our analysis is NRS 51.385, the Nevada statute pro.iding the basis for the hearsay exception invoked by the State, and the decision of the United States Supreme Court in *Idaho v. Wright*.

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[4] Although NRS 51.385 does not require the unavailability of the hearsay declarant as a prerequisite to the admissibility of the declarant's statements, we are satisfied on this record that the trial judge correctly determined that the child was unavailable as a witness. The record reveals, as described by the prosecutor, that the child "froze" and would not even stand or communicate to take the oath. Moreover, defense counsel did not contest the district court's ruling concerning the child's unavailability as a witness.

We therefore conclude that it is unnecessary to presently decide whether unavailability is a prerequisite to the admissibility of out-of-court statements by alleged child-victim declarants where the statements do not fall within firmly rooted hearsay exceptions. We note, however, that as a general proposition, it appears that the trend in both the state and federal courts is to not make admissibility dependent upon unavailability. Furthermore, in the context of firmly rooted hearsay exceptions, the United States Supreme Court recently held that the confrontation clause of the Sixth Amendment does not require either the production of the declarant at trial or a determination by the trial court that the declarant is unavailable. *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992).

THE CONSTITUTIONALITY OF NRS. 51.385

NRS 51.385, in its entirety, provides:

51.385 Admissibility; notice of unavailability or inability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

(a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) Child either testifies at the proceeding or is unavailable or unable to testify.

2. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

The statute, enacted in 1985, was designed to address mounting societal concerns over what is generally perceived to be the rapidly growing menace of child sexual abuse. Usually, the younger the child, the greater the difficulty in achieving criminal accountability because of the sequestered setting in which the crime is usually committed, and the limited ability of very young victims to communicate the nature and extent of their travails. Sexual crimes involving children of tender years thus strain the capacity and flexibility of the criminal justice system to sensitively--and constitutionally--accommodate effective prosecution.

Fortunately, it has been determined that the Confrontation Clause does not require that a defendant be given the absolute right to confront and cross-examine adverse witnesses. Thus, in *Wright*, the Court observed that "[w]e reaffirmed only recently that '[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme."'" *Wright*, 497 U.S. at ___, 110 S. Ct. at 3145 (quoting both *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), and *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)); *see also Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (where necessary, Confrontation Clause permits the admission of hearsay statements despite inability of defendant to confront declarant at trial).

Having thus concluded long ago that the Confrontation Clause does not invariably require the right to confront, the Supreme Court more recently announced two criteria for the admissibility of hearsay statements that will satisfy Sixth Amendment constraints where the declarant is unavailable for cross-examination. First, the Confrontation Clause usually requires the prosecution to demonstrate that the declarant is unavailable. Second, upon a showing of unavailability, the hearsay statement may be admitted if: (1) the statement satisfies the indicia of a "firmly rooted" hearsay exception; or (2) the statement reflects "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).[5]

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[5] In the recent case of *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992), the Court reaffirmed its earlier clarification of Roberts as enunciated in *United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) ("*Roberts* must be read

Facially, NRS 51.385 satisfies the *Roberts* criteria for admissibility despite the unavailability of the declarant and the resultant lack of opportunity to confront. We recognize that the hearsay exception created by the statute is not "firmly rooted" in the law of evidence. However, it does require a finding validated by a special hearing that "the time, content and circumstances of the statement provide sufficient circumstantial *guarantees of trustworthiness*." NRS 51.385(1)(a) (emphasis added). The statutory language is designed, by reference to "time, content and circumstances," to provide *particularized* guarantees of a statement's trustworthiness. We therefore conclude that NRS 51.385 is constitutional on its face.[6]

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consistently with the question it answered, the authority it cited, and its own facts"), and concluded that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White*, ___ U.S. ___ at ___, 112 S. Ct. at 741. As noted in footnote 4, *supra*, however, the question in *White* concerned whether it was necessary for the prosecution to produce the hearsay declarant at trial or the trial court to find the declarant unavailable as a predicate to the admissibility of out-of-court statements that fell within a firmly rooted hearsay exception.

In the instant case, the child's out-of-court statements are not within the category of a firmly rooted exception. We have elected not to decide whether a determination of unavailability is necessary where, as here, the out-of-court statements are admitted under the general hearsay exception founded upon guarantees of trustworthiness, as we have concluded that the child victim was, in fact, unavailable to testify at trial.

[6] Courts in other jurisdictions have upheld similar statutes against constitutional attack. *See State v. Bellotti*, 383 N.W.2d 308

THE CONSTITUTIONALITY OF NRS 51.385 AS APPLIED

The application of the standard provided in *Roberts* was a primary focus of *Idaho v. Wright*. The *Wright* court determined that the Constitution does not impose a fixed set of procedural prerequisites to the admission of hearsay attributable to children. *Wright*, 497 U.S. at ___, 110 S. Ct. at 3148. Nevertheless, the Court adverted to several non-exclusive factors that may be significant in determining the reliability of hearsay statements referable to children in child sexual abuse cases. The factors identified by the Court included: (1) spontaneity and consistency in repetition; (2) declarant's mental state; (3) use of unexpected terminology by child of a given age; and (4) absence of motive to fabricate. Disavowing mechanical tests for determining particularized guarantees of trustworthiness, the Court declared that "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3150.

Although NRS 51.385 is not the codification of a firmly rooted hearsay exception, the statute does provide a proper forum for the evaluation and determination of the trustworthiness of child hearsay outside the presence of the jury. In such a setting, reliability may be more vigorously contested and more accurately discerned. In any event, with justifiable deference to the "unifying principle," our review

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(Minn. Ct. App. 1986); *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (Kan. 1985); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (Wash. 1984).

now focuses on the facts of the instant case measured against the guidelines enunciated by the *Wright* court.

First, the circumstances under which the child victim initially revealed the incidents upon which the criminal charges were based generate an intuitive sense of trustworthiness. During the night, the child awoke from her sleep distressed and sobbing, and sought solace from her mother. The visibly upset six-year-old, after receiving assurances from her mother, provided the details of what had been happening to her. It strains credulity to conclude, under the conditions described, that the child's mentation would conjure up the parade of horrors she related about her stepfather. Moreover, the child's outpouring to her mother reflected a natural spontaneity indicative of truth.

The young victim's second recitation of Bockting's criminal behavior occurred during her interview with Detective Zinovitch in the latter's office. There, the girl's restatement of her travails was consistent with the details she had previously told to her mother.

The child's third consistent description of the events came when, of her own volition, she asked for dolls, and received the anatomically correct dolls. With the dolls, she demonstrated the various positions involved in the commission of the crimes. Again, the child's explanations and demonstrations with the dolls were sufficiently spontaneous to inspire confidence in their reliability. *See generally D.A.H. v. G.A.H.*, 371 N.W.2d 1 (Minn. Ct. App. 1985) (child's statements to psychologist admitted, statements were spontaneous even with the passage of time). The girl's two verbal descriptions and the demonstrations and explanations connected with the dolls indicate consistent repetition in her out-of-court statements that adds an element

of trustworthiness. *See* J. Myers, Child Witness Law and Practice § 5.37, at 367 (1987). Moreover, we were pleased to see that the veteran detective conducted the recorded interview with the child in a manner that was not suggestive, leading, or indicative of a predetermined resolve to produce evidence of child abuse.

The language used by the victim in describing what her stepfather had done to her was consistent with that expected of a six-year-old child. During her explanations of the sexual attacks, the child used such child-like terms and descriptions as "pee-pee," "butt," and "sucking on his pee-pee like a sucker" until "white bubbly stuff came out" and went into her mouth. She also described and demonstrated through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child. In explaining how the act of anal intercourse occurred, she told how she held onto the sink while Bockting was behind her and "would press real hard and it hurt." The terminology used by the girl indicated a familiarity with sexual conduct not usually known by six-year-olds.[7] Further, the child's statements reflect knowledge of sexual acts that a child of six would not usually be aware of absent personal experience.

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[7] We note, however, that the victim's mother testified that her daughter had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults. Although the mother testified to the contrary, Bockting stated that the child saw the couple engaging in oral sex, in addition to vaginal intercourse. Bockting also testified that the little girl was "interested" in sex.

Prior to describing her stepfather's conduct to her mother, the child hesitated because she was afraid Bockting would "beat her butt" and "mommy would send daddy away." After the victim's mother confronted Bockting and told him to leave, the girl wanted to hug and kiss him. This conduct is inconsistent with the notion that the six-year-old did not like her "father" or that she wanted him out of the home. In fact, the child's actions reflect feelings of affection for her stepfather. There was no apparent reason or motive for the child to fabricate a story of sexual misconduct by Bockting. "[I]t is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a story such as the one told by [the child victim]." *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988).

A careful comparison of the factors accorded significance in *Idaho v. Wright* with those present in the instant case causes us to conclude that: (1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate. Neither the foregoing factors nor any other aspect of the record evidence provides insights into a motive for dissembling on the part of the child. We therefore conclude that the district court was justified in finding that the

child's hearsay statements were reliable and admissible under the criteria specified in NRS 51.385 and *Idaho v. Wright*.[8]

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[8] The majority in *Idaho v. Wright* determined that for purposes of satisfying the requirements of the Confrontation Clause, corroborating evidence is not to be considered in determining the reliability of hearsay statements. 497 U.S. at 821, 110 S. Ct. at 3150. This point has been vigorously criticized by legal scholars and by Justice Kennedy and the three other justices who joined in his dissent. Of necessity, we have reluctantly adhered to the majority opinion in our resolution of this appeal. We would, however, most respectfully urge the Court to reconsider the majority view.

Aside from relevancy, the *sine qua non* of admissible evidence is reliability. Indeed, the *Wright* majority validates the admissibility of hearsay statements falling within firmly rooted exceptions on the basis of the indicia of reliability upon which they are founded. It appears to us that "corroborative evidence," as it relates to hearsay statements proffered on the basis of particularized guarantees of trustworthiness, is evidence that tends to make the reliability of the hearsay statement more probable. Such evidence seems to have special significance and justification under the "reliability" hearing mandated by NRS 51.385. The greater the corroboration, it would appear, the greater the prospect of the statement's trustworthiness. In the context of the instant case, the fact that medical evidence confirms that the child had been violated and injured by some blunt force which could include an erect adult penis, created an added element of reliability to the child's statements. The fact that there was no evidence of the victim being in the care of any adult male other than the defendant during the relevant period, was probative of reliability concerning both the fact of sexual abuse and the identity of the abuser. And yet, under the *Wright* ruling, we were forced to disregard these "particularized" sources of evidence of trustworthiness.

In viewing the totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*, we conclude that the district court did not err in finding sufficient "particularized guarantees of trust-worthiness" to admit the proffered statements. We therefore hold that NRS 51.385 is constitutional as applied to Bockting and his rights under the Confrontation Clause.

It would also appear difficult to accurately assess the "lack of motive to fabricate" factor identified by the Wright majority without resort to evidence extraneous to the "circumstances surrounding the making of the out-of-court statement." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3149. For example, if it is necessary to exclude medical evidence of sexual abuse, it would also appear necessary to exclude evidence of marital discord on the part of the parents as a possible motive in the mother for having the child fabricate charges of sexual abuse against the husband. Moreover, the conclusion of the *Wright* majority that "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement," 497 U.S. at 805, 110 S. Ct. at 3151, seems to assume that any truth less than the entire truth is more dangerous than little or no truth at all. Even the firmly rooted exceptions to the hearsay rule are based upon probabilities short of certainty. In any event, the corroborative evidence is not, in the first instance, produced for a jury to consider in weighing the reliability of the proffered hearsay. It is the trial judge who must, under the totality of the circumstances, determine whether there are "sufficient circumstantial guarantees of trustworthiness" to permit introduction of the statement. NRS 51.385(1)(a). We are confident that our trial judges are sufficiently trained to use corroborative evidence as but one additional factor to weigh in determining the extent to which such hearsay statements bear indicia of reliability.

For the reasons stated above, we conclude that Bockting was fairly tried and convicted. Accordingly, we affirm the judgment of conviction entered by the district court.[9]

/s/ _____
Rose, C.J.

/s/ _____
Steffen, J.

/s/ _____
Young, J.

/s/ _____
Springer, J.

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[9] The Honorable Miriam Shearing, Justice, did not participate in the decision of this matter.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-98-0764-ECR (VPC)

[Filed March 19, 2002]

MARVIN HOWARD BOCKTING,	)
Petitioner,	)
	)
v.	)
	)
ROBERT BAYER, *et al.*,	)
Respondents.	)
	)

ORDER

Petitioner Marvin Howard Bockting ("Bockting") filed a second amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his sentence and conviction (Docket #35). Respondents filed a motion to dismiss the petition under *Rose v. Lundy,* 455 U.S. 509 (1982), arguing that several claims forwarded in the petition were unexhausted (Docket #37). This court previously determined that Bockting has failed to exhaust state court remedies with regard to two of his constitutional ineffective assistance of counsel claims: (1) trial counsel was ineffective in his performance at an evidentiary hearing held to determine the admissibility of the child victim's statements and (2) trial counsel failed to adequately cross examine or impeach the direct testimony of prosecution witnesses (Docket #47).

In response, Bockting filed a declaration abandoning these claims. Thus, pending before the court at this time are the

remaining claims in the petition. These include a claim based on the Confrontation Clause, several claims based on the Due Process Clause, and three claims based on petitioner's Sixth Amendment right to effective assistance of counsel. The court has reviewed the entire record in this case, including all exhibits of the state proceedings, as well as all of the pleadings, motions and other documents filed in the record of this case. Following that review, the court concludes that the Bockting is not entitled to relief pursuant to 28 U.S.C. § 2254, and that his petition for writ of habeas corpus shall be denied.

A. Facts of Case

In January of 1988, Bockting was living in a Las Vegas motel with his wife Laura Bockting ("Laura"), Laura's six year old daughter, and Bockting and Laura's three year old daughter. On January 11, Laura started taking evening classes at a local business college. Bockting watched the two children while she was gone. According to Laura's testimony, the six year old daughter came to her on the night of January 16 and related to her details of sexual abuse by Bockting that she (the daughter) had endured one evening while Laura was away at class. Laura testified as to the various sexual acts her daughter had told her Bockting had committed during this episode.

On January 19, Laura took her daughter to the hospital where Detective Zinovitch with the Sexual Assault Unit of the Las Vegas Metropolitan Police Department unsuccessfully attempted to interview the child. The detective then ordered that the child be medically examined. He also arranged with Laura to interview the child a couple of days later. Doctor Rivers, a gynecologist, testified at trial that her examination of the child revealed injuries to the rectum and vagina that were consistent with "blunt force" having been applied to

those areas. At least with regard to the rectal injury, Doctor Rivers concluded that it had occurred within a week prior to the examination. When asked at trial whether any other males had been around the child in the week prior to the examination, Bockting answered that "when [he] was around, no one."

On January 21, Detective Zinovitch interviewed the child. The child described to the detective sexual acts very similar, if not identical, to those which she had related to Laura. He testified that the child's descriptions of these events were credible, that she used age appropriate terminology as opposed to terms normally used by adults, and that she accurately re-enacted the events using anatomically correct dolls.

At Bockting's preliminary hearing, the child became very upset during questioning and her testimony was terminated before the defense had an opportunity to cross examine her. Bockting was, nonetheless, held to answer based on the testimony of Laura Bockting and Detective Zinovitch. On August 15, 1988, Bockting's trial commenced in the Eighth Judicial District Court. Upon being called to testify at trial, the child became distraught and the court ruled that she was again unavailable as a witness. The prosecution then moved for her hearsay statements (to Laura and Detective Zinovitch) to be admissible under NRS 51.385. After an evidentiary hearing, the trial court ruled in the prosecution's favor, but also ordered that the defense would be able to present the child's preliminary hearing testimony to the Jury.

On August 18, 1988, after a three day trial, a Jury found Bockting guilty of three counts of sexual assault on a minor under the age of 14 years. On September 21, 1988, he was sentenced to life imprisonment (two consecutive terms and the

third concurrent with the second) with the possibility of parole on each count. Bockting appealed the judgment of conviction to the Nevada Supreme Court. On June 22, 1989, the Supreme Court entered an order dismissing appeal deciding that all of Bockting's contentions on appeal lacked merit.

Bockting then applied to the United States Supreme Court for a writ of certiorari. On July 5, 1989, the Nevada Supreme Court stayed the issuance of the remittitur pending the outcome of the application. On April 13, 1990, while his application to the United States Supreme Court was pending, Bockting filed a petition for post-conviction relief in the Eighth Judicial District Court.

On June 28, 1990, the United States Supreme Court issued an opinion which vacated the Nevada Supreme Court's order dismissing Bockting's appeal and remanded the matter to that Court for further consideration in light of *Idaho v. Wright,* 497 U.S. 805 (1990). The Nevada Supreme Court subsequently affirmed the petitioner's conviction on March 8, 1993, finding that the child's hearsay statements were admissible under the criteria set forth by the United States Supreme Court in *Wright*. On April 22, 1993, Bockting voluntarily dismissed his petition for post-conviction relief in the Eighth Judicial District Court, such petition having been held in abeyance while direct appeal proceedings were pending.

On March 30, 1994, Bockting filed another petition for post-conviction relief in the Eighth Judicial District Court. On July 6, 1994, the court held an evidentiary hearing despite the fact that Bockting was not present or represented at the hearing. On September 15, 1994, the court's order denying the petition was filed. Bockting appealed this order to the Nevada Supreme Court. On December 24, 1997, the Nevada

Supreme Court filed its order dismissing appeal. Bockting's next step was to file a petition for a writ of habeas corpus in this court.

B. Legal Discussion

The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by Bockting and the respondents. Following that review, the court is fully apprized of the facts and circumstances regarding this matter, and finds that further briefing by the parties is neither warranted nor required. Further, the court finds that the factual record has been sufficiently developed in the state courts regarding issues presented in this petition. For any claim which Bockting contends that such factual development has not occurred, the court finds that Lord has not demonstrated that he can meet the requirements of 28 U.S.C. § 2254(e)(2). Thus, this court will not hold an evidentiary hearing in this matter.

After having examined each claim in detail, the court finds none of them sufficient to warrant the issuance of the writ.

1. Ground One

As Ground One, Bockting claims that his right to confront and cross examine a witness against him, as guaranteed by the by Sixth Amendment, was violated when the trial court allowed the child victim's hearsay statements to be admitted

at trial based on NRS 51.385.[1] Bockting argues, in apparent reference to 28 U.S.C. § 2254(d)(1), that the Nevada Supreme Court's ruling that the child's hearsay statements were reliable and, thus, admissible under the criteria set forth in *Idaho v. Wright* was an "unreasonable application" of clearly established federal law. In support of this argument, Bockting makes several factual allegations which he claims indicate that the child's statements did not have the "particularized guarantees of trustworthiness" required by *Wright*. 497 U.S. at 818-21.

The United States Supreme Court in *Wright* clarified the test for determining whether the admission at trial of hearsay statements made by an alleged child victim of sexual abuse will violate the Confrontation Clause. The Court held that the admission of such a statement will not run afoul of the Clause if the statement either (1) falls within a firmly rooted hearsay exception or (2) is supported by a showing of "particularized guarantees of trustworthiness." *Id.* If the statement does not meet the former requirement, there is a presumption of unreliability which the State must overcome by showing that statement meets the latter requirement based on "the totality of the circumstances" surrounding the making of the statement. *Id.* at 819. The circumstances that may be considered are only those "that surround the making of the statement and that render the declarant worthy of belief." *Id.* Other evidence presented at trial that might corroborate the truth of the statement is not to be considered in this inquiry. *Id.* at 822. Finally, in announcing this two-part test, the Court

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[1] NRS 51.385 provides for, under specified circumstances, the admissibility in criminal proceedings of hearsay statements describing sexual conduct made by a child under the age of 10 years.

in *Wright* declined to decide whether the child declarant's unavailability as a witness must be established before his or her out-of-court statements are admitted. *Id.* at 816.

Applying this test, the Nevada Supreme Court found that, while NRS 51.385 is not a codification of a "firmly rooted hearsay exception," the following facts nonetheless demonstrated the reliability of the child's statements:

> "(1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate."

Bockting v. State, 109 Nev. 103, 111 (1993). The Court also noted that the record was devoid of evidence of any motive the child might have to fabricate her statements. *Id.* Based on these factors, the Court concluded that the child's hearsay statements were properly admitted by the trial court under *Wright*. *Id.*

While not resoundingly convinced that the State overcame the presumption of unreliability attached to hearsay statements that do not fall within a firmly rooted hearsay exception, this court must nonetheless deny Bockting's application for habeas relief based on the Confrontation Clause. As to the reliability

of the child's hearsay statements, this court is mainly concerned with the fact that the child's abbreviated preliminary hearing testimony deviated from her previous description of events and, at no point, was the child subject to any form of cross examination or adverse questioning. Even so, the Nevada Supreme Court's decision on this issue was sufficiently consistent with federal law so as to preclude this court from granting habeas relief.

As to any habeas claim that was adjudicated on the merits by the state court, a federal court may grant relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362 (2000), the United States Supreme Court provided some clarity as to how to apply 28 U.S.C. § 2254(d)(1). It held that the "contrary to" and "unreasonable application" clauses have distinct meanings. *See Williams,* 529 U.S. at 404-10; *see also, Van Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir. 2000). Under the "contrary to" clause, a federal court should grant the writ (1) when the state court has failed to apply the correct controlling authority from the Supreme Court or (2) when the state court has applied the correct controlling authority from the Supreme Court to a case involving facts "materially indistinguishable" from those in a controlling case, but has nonetheless reached a different result. *Van Tran,* 212 F.3d at 1150 (citing *Williams,* 529 U.S. at 406).

Under the "unreasonable application" clause, a federal court should grant the writ when the state court's application of clearly established federal law is "objectively unreasonable." *See Williams,* 529 U.S. at 409. The Ninth Circuit Court of Appeals has held that a decision is "objectively unreasonable" when it is clearly erroneous. *See*

Van Tran, 212 F.3d at 1152-54. It is not enough that the court is convinced that the petitioner has the better of two reasonable legal arguments. Instead, the court must be left "with a 'firm convictlon' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred." *Id.* at 1153-54.

Here, the Nevada Supreme Court's decision was neither "contrary to," nor did it involve "an unreasonable application of," clearly established federal law. The Nevada Supreme Court applied the correct controlling authority from the United States Supreme Court *(Idaho v. Wright)* and, although it reached a different result, this case involved facts which were materially distinguishable from those in *Wright.* In *Wright,* the Court identified only two factors (lack of motive to "make up a story of this nature" and statement not type that one would a expect a child of the given age to fabricate) relevant to a showingof the "particularized guarantees of trustworthiness." 497 U.S. at 826. Looking to the "totality of the circumstances," the Court concluded that these factors did not outweigh the presumption of unreliability of out-of-court statements and the suggestive manner in which the examining pediatrician conducted the interview. *Id.* at 826-27.

In the present case, the Nevada Supreme Court identified the five factors noted above as relevant to a showing of the "particularized guarantees of trustworthiness." It also concluded that the record contained no indication of any motive the child might have to fabricate a story of sexual abuse. Thus the facts of Bockting's case are sufficiently distinguishable from those in *Wright* to prevent this court from finding that the Nevada Supreme Court's decision was "contrary to" established federal law.

The Nevada Supreme Court's application of *Idaho v. Wright* was also not "objectively unreasonable." Despite the reservations mentioned above, this court is not left with a "firm conviction" that the application of federal law that the Nevada Supreme Court adopted was erroneous and that Bockting's position on this issue is the correct one. Other than the two points mentioned above – i.e., a deviation from prior accounts in the child's testimony at the preliminary hearing and the absence of *any* opportunity for cross examination or adverse questioning – Bockting's claims of unreliability are based largely on unsubstantiated allegations.[2] For example, Bockting claims that Laura Bockting coerced her daughter into making accusations against him and that Detective Zinovitch's interview was tainted by suggestion and constant

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[2] Bockting also makes a passing claim that the Nevada Supreme Court unreasonably applied federal law by failing to address the trial court's finding that the child victim was "unavailable" as a witness. This claim is without merit. The United States Supreme Court in *Wright* specifically noted that, for the purposes of that decision, the "requirement of unavailability" was not at issue. Thus, in complying with the U.S. Supreme Court's mandate to review its prior decision in light of *Wright*, the Nevada Supreme Court was not required to address the issue of the child victim's availability as a witness.

Nonetheless, the Nevada Supreme Court did, in fact, address this issue by noting that it was satisfied that the record supported a finding that the child was "unavailable" as a witness and that, in any case, the general trend among the state and federal courts was to find that the Confrontation Clause did not require a finding that the witness was unavailable before admitting his or her hearsay statements. *Bockting*, 109 Nev. at 106, n.4. Indeed, in *White v. Illinois*, 502 U.S. 346, 354 (1992), the Supreme Court noted that availability of the witness is relevant to a Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.

correction in eliciting responses from the child. However, the record contains little, if any, evidence to support either of these allegations. Thus, not only was the Nevada Supreme Court's decision not an unreasonable application of federal law, it was probably the correct result given the record before the Court.

2. Ground Two

As Ground Two, Bockting claims that his due process rights under the Fifth and Fourteenth Amendments were violated based on the trial court's admission of evidence of prior bad acts and based on several instances of alleged prosecutorial misconduct. As to the former basis, the court finds that the admission of evidence of prior bad acts was neither arbitrary nor more than minimally prejudicial. Thus, Bockting's due process rights were not violated as a result of the admission of any such evidence. Similarly, as to the latter basis, this court concludes that Bockting has failed to demonstrate that his constitutional due process rights were violated based on either a single instance of alleged prosecutorial misconduct or the cumulative effect of such instances.

a. Evidence of Prior Bad Acts

In cross examining one of Bockting's character witnesses at trial, the prosecution inquired, over a defense objection, as to whether Bockting had ever informed the witness of a prior instance of the child victim making an allegation of sexual misconduct against Bockting when the family lived in Colorado. The witness testified that Bockting had never mentioned such an incident to her. Later in the trial, on rebuttal, the prosecution elicited testimony from Laura Bockting that, while living in Colorado, she had confronted

Bockting with regard to an allegation of sexual misconduct, but that, at the time, she believed Bockting's denial of the allegation.[3]

The Eight Judicial District Court, in ruling upon Bockting's petition for post-conviction relief, determined that the cross examination of Bockting's witness regarding the prior bad act was permissible because the witness had been called to testify to Bockting's character. As to Laura Bockting's rebuttal testimony, the court concluded that, because the testimony regarding the prior bad act was very limited, it was non-prejudicial and within the trial court's discretion to admit.

This court need not engage in a detailed analysis of Nevada's evidentiary rules and the issue of whether the trial court may have erred in admitting the challenged testimony. A state court's evidentiary ruling is not subject to federal habeas review on due process grounds unless "the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walters v. Maass,* 45 F.3d 1355, 1357 (9th Cir. 1995). In Bockting's case, the admission of the evidence was not "arbitrary" in that it was arguably, if not actually, admissible under Nevada's evidence rules. *See* NRS 48.045 and 48.055.

The evidence was also not sufficiently prejudicial so as to render the trial fundamentally unfair. With regard to the cross examination of Bockting's character witness, the essence of the witness's testimony was that she had no knowledge of any

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[3] Bockting also claims that the prosecutor made reference to this incident in his closing argument, but if so, the reference is so veiled as to be inconsequential.

such prior incident. As to any prejudicial effect that may have arisen from the prosecutor's line of questioning, the jury was specifically instructed to "not speculate to be true any insinuations suggested by a question asked a witness" and that "[a] question is not evidence and may be considered only as it supplies meaning to the answer." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31).

As for Laura Bockting's rebuttal testimony, the prior bad act evidence consisted entirely of the following exchange:

Prosecutor: Without going into the details underlying this I am going to ask you the following question. Between July 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and [the child]?

Laura: Yes.

Prosecutor: What was his response at the time?

Laura: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what [the child] said.

Prosecutor: And did you take any action or do anything at that time?

Laura: No I did not.

The admission of this testimony was not so egregious or

damaging so as to render Bockting's trial fundamentally unfair. *See, e.g, Drayden v. White,* 232 F.3d 704, 710-11 (9th Cir. 2000). In light of the weight of all the other evidence supporting Bockting's guilt, it is highly unlikely that the jury relied on this brief testimony in finding Bockting guilty of sexual assault.

b. Prosecutorial Misconduct

Bockting's allegations of prosecutorial misconduct in his petition are less than cohesive, however, he generally claims that the prosecutor in his trial was guilty of: (1) shifting the burden of proof to the defendant; (2) commenting on the defendant's right to remain silent; (3) making inflammatory comments which were not supported by evidence presented at trial; and (4) vouching for the credibility of witnesses. Bockting claims that the cumulative effect of this alleged misconduct together with the admission of the evidence of a prior bad act[4] violated his constitutional right to due process. This court finds no such constitutional violation.

Bockting contends that the prosecutor impermissibly shifted the burden of proof to the defense when, in closing argument, he pointed out to the jury that the defense had not been able to explain how the victim had received a rectal injury. Bockting also claims that the prosecutor's comments in this regard amounted to a statement that Bockting's exercise of his right to remain silent was an admission of guilt. There is no merit to either argument.

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[4] In making his "cumulative effect" argument, Bockting includes the admission of evidence of prior bad acts as an instance of prosecutorial misconduct. It is more properly characterized as an evidentiary issue, which is why this court analyzed it separately as such.

At Bockting's trial, the jury was duly instructed that the defendant was presumed innocent and that the State had the burden of proving every material element of the charged crimes beyond a reasonable doubt. The prosecutor's comments, rather than shifting the burden of proof, merely highlighted the strength of the State's case on a material element of sexual assault. The essence of the comments was that the State had proved that element beyond a reasonable doubt and that the defense had presented no evidence to the contrary. As such, the prosecutor's comments were within the bounds of permissible closing argument.

The prosecutor's comments were also not an improper comment on Bockting's exercise of his right to remain silent. As noted in *United States v. Mendes*, 43 F.3d 1298, 1301 (9th Cir. 1995), in considering the propriety of prosecutorial comments there is "a distinction between a comment on the defense's failure to present exculpatory evidence as opposed to a comment on the defendant's failure to testify." Comments of the former type are permissible as long as they are not phrased so as to call attention to the defendant's failure to testify. *Id.* Also, a comment as to the failure of the *defense*, as opposed to the *defendant*, to counter or explain prosecution evidence does not implicate a defendant's Fifth Amendment rights. *Id.* When considered based on these standards, the prosecutor's comments as to the defense's failure to explain the victim's rectal injury are beyond constitutional challenge, especially in light of the fact that Bockting chose to testify at trial.

Bockting claims that the prosecutor's references in closing argument to the victim's crying during the aborted effort to have her testify were inflammatory and not based upon "evidence" presented at trial. Bockting also cites statements in which the prosecutor referred to the trust that children

have in adults and in which the prosecutor conjectured what the victim would say if asked a specific question. This court agrees that the prosecutor engaged in misconduct by referring to the victim's crying episode, which was not admissible evidence, and by speaking on behalf of the victim in the first person. *See, Drayden,* 232 F.3d at 712-13. This finding alone, however, does not serve as a basis for habeas relief. As set forth more fully in the cumulative error analysis below, the inquiry for the federal habeas court is not whether error occurred, but rather, whether such error was of constitutional magnitude. *Id.* at 713.

Bockting's final claim of prosecutorial misconduct is that the prosecutor improperly vouched for the credibility of the State's witnesses and gave his own opinion that it would have been impossible for the victim's mother to have induced the victim to fabricate a story of sexual abuse. In this regard Bockting challenges the prosecutor's statement that testimony of Dr. Rivers "is probably some of the most important testimony that you heard . . . because it tells you something that is real, that you could see, that is not what somebody thinks." The prosecutor also made several references in his closing argument to Laura Bockting's truthfulness and candor. Finally, the prosecutor stated, in reference to the testimony of a family therapist who treated the victim, that he thought "her opinion was straightforward."

A prosecutor engages in impermissible "vouching" when he either (1) places the prestige of the government behind a witness through personal assurances of the witness's truthfulness or (2) suggests that information not presented to the jury supports the witness's testimony. *United States v. Jackson,* 84 F.3d 1154, 1158 (9th Cir. 1996). Here, the prosecutor did not impermissibly vouch for the testimony of either Dr. Rivers or the family therapist. With regard to his

comments about the testimony of Dr. Rivers, the prosecutor was merely juxtaposing the gynecologist's empirical conclusions based on her medical examination of the victim with conclusions of other witnesses which were more speculative. Similarly, by stating that the family therapist's opinion was straightforward, the prosecutor was not giving his personal assurance that the her testimony was truthful. Instead, he was accurately describing her *opinion* as plain, non-evasive and free from ambiguity.

This court also finds no misconduct in the prosecutor's statements as to the impossibility of the victim having been coached by her mother to fabricate a story of sexual abuse. Such statements were, for the most part, inferences drawn from evidence presented at trial and well within the bounds of permissible argument.

The prosecutor's repeated references to the truthfulness of Laura Bockting's testimony did, however, constitute impermissible vouching. Even so, as noted above, an instance of prosecutorial misconduct does not necessarily deprive the defendant of his or her constitutional rights. The issue for this court to decide is whether the cumulative effect of trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Thomas v. Hubbard,* 273 F.3d 1164, 1179 (9th Cir. 2002) (quoting *Donelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). This analysis is similar to the inquiry set forth in *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) which asks whether an error had "a substantial and injurious effect" On the outcome. *Thomas,* 273 F.3d at 1179-80.

Here, the instances of prosecutorial misconduct did not have a "substantial and injurious effect" on the outcome of Bockting's trial. If the Laura Bockting's testimony stood alone

as on the only evidence recounting the episode of sexual abuse suffered by the victim, then the prosecutor's vouching for her testimony may have been sufficient to establish a due process violation. However, this evidence was also provided by Detective Zinovitch's testimony. Thus, the most incriminating portions of Laura Bockting's testimony, rather than being the lone pillar supporting a material element of the State's case, was corroborated, and practically duplicated, by the detective's testimony.

Adding any prejudice that may have resulted from the inflammatory prosecutorial statements discussed above does not tip the scale in favor of finding a violation of Bockting's due process rights. Such prejudice was minimized by instructions given to the jury. The jury was instructed that its verdict was not to "be influenced by sympathy, prejudice, or public opinion," but instead should be "a product of sincere judgment and sound discretion in accordance with" the rules of law set forth in the jury instructions. It was also instructed that "[s]tatements, arguments and opinions of counsel are not evidence in the case." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31). Also, strong evidence of Bockting's guilt was presented at trial: medical evidence that the victim's vagina and rectum had been penetrated; Detective Zinovitch's testimony regarding the account of sexual abuse that had been related to him by the victim; and Bockting's admission that no other male individual had been alone with the victim during the time that the abuse most likely occurred. *See, Drayden,* 232 F.3d at 713. Thus, prosecutorial misconduct did not render Bockting's trial "fundamentally unfair." *Id.*

Finally, this result would not be impacted by a conclusion that the trial court's admission of the prior bad act evidence was in error. As discussed above, this evidence was so limited

as to have minimal prejudicial effect. Thus, even if considered as an additional component of cumulative error, Bockting still received a constitutionally fair trial.

3. Ground Three

As Ground Three, Bockting claims that he was deprived of his Sixth Amendment right to effective assistance of counsel both at his criminal trial and in his subsequent appeal. As noted above this court previously categorized this ground into five separate claims, two of which the court found unexhausted. The three remaining claims of unconstitutional ineffective assistance of counsel are as follows: (1) trial counsel failed to adequately investigate, prepare, or present a defense based on the theory that the child victim's mother had "coached" the victim and had otherwise manufactured evidence against the petitioner; (2) trial counsel failed to raise objections to errors in the trial court proceedings which resulted in the admission of prejudicial evidence and argument and the inability to raise such errors as issues on appeal; and (3) appellate counsel failed, in handling the appeal of Bockting's conviction, to adequately research and present appealable issues to the state supreme court.

Ineffective assistance of counsel claims are governed by the standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that his trial counsel's performance fell below an objective standard of reasonableness and that, as a result, the result of his trial is unreliable. 466 U.S. at 687-688. Put another way, "[t]o prevail on a claim of ineffective assistance of counsel, [petitioner] must show that his trial counsel's performance fell outside a wide range of reasonableness and that he was

prejudiced by that performance. Prejudice occurs where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Weighall v. Middle,* 215 F.3d 1058, 1062 (9th Cir. 2000) (quoting *Strickland,* 466 U.S. at 694). Habeas petitioners claiming ineffective assistance of counsel must affirmatively demonstrate prejudice. *Cooper v. Calderon,* 255 F.3d 1104, 1109 (9th Cir. 2001).

a. Failure to Pursue "Coaching" Theory

In support of his claim that his counsel failed to pursue a viable defense theory, Bockting contends that his trial counsel should have attempted to develop evidence which Bockting claims would have demonstrated that Laura lacked credibility and that she induced the victim into making false accusations against him. Bockting asserts that, to this end, his counsel should have interviewed the six year old victim and subjected her to an independent psychological examination. He also claims that counsel should have further investigated an alleged visit Laura Bockting made to the state welfare office the day before she reported the sexual abuse of her daughter.

At the State court evidentiary hearing with regard to Bockting's petition for post conviction relief, a memorandum written by Bockting's trial counsel and dated May 5, 1988, – three months prior to Bockting's trial – was introduced into evidence. This memorandum states that counsel had considered requesting an independent psychological evaluation of the victim, but chose not to after Bockting clearly failed a polygraph examination. According to the memorandum, counsel feared that the results of such an evaluation would be damaging to the defense in that such

results would indicate that the victim was probably telling the truth. Trial counsel also testified at the evidentiary hearing that he had conducted some inquiry into Laura's purported visit to the welflhre office, but did not consider the information derived from that inquiry to be particularly compelling or relevant. Finally, with regard to trial counsel's failure to interview the victim, the prosecutor represented to the court at the evidentiary hearing that neither the victim nor her mother were willing to speak with defense counsel.

The Eight Judicial District Court found that Bockting's defense theory was supported by only his unsubstantiated allegations and that counsel's performance was not deficient because "no amount of investigation would have made [Bockting's] 'substantial defense' viable." The state court also found no showing of prejudice. While the question of ineffective assistance of counsel is a mixed question of law and fact, *see Strickland, supra,* 466 U.S. at 697, whether counsel conducted an adequate investigation is an issue of fact. This court is required to presume the correctness of factual determinations made in the state courts. 28 U.S.C. § 2254(e)(1). The state court's determination that Bockting's counsel conducted an adequate investigation into Bockting's defense theory is presumptively true.

The presumption of correctness may only be overcome by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Jeffries v. Wood,* 114 F.3d 1484, 1500 (9th Cir.), *cert. denied* 522 U.S. 1008 (1997). In this case, Bockting has provided no evidence which remotely approaches this standard. He makes bare allegations in his habeas petition regarding Laura Bockting's unreliability and possible motives, but he has not brought this court's attention to any *evidence* of stones left unturned by his trial counsel which would have supported a defense theory that the victim's

mother fabricated evidence against Bockting. Consequently, even in the absence of the presumption created by the state court's findings of fact, this court would be unable to find that Bockting's trial counsel's performance fell below constitutional standards. As such, this court need not inquire into the "prejudice" prong of the *Strickland* test.

b. Failure to Object to Trial Court Errors

Bockting asserts that his trial counsel wasineffective for not objecting to the admission of prior bad acts evidence or to the instances of prosecutorial misconduct discussed in Section B.2. above. Bockting claims that, as a result, the jury heard prejudicial testimony and argument that should have been excluded at trial and such instances of trial court error were not preserved as issues for appeal.

The "prejudice" prong of the *Strickland* test (i.e., demonstrating a reasonable probability that the outcome of the trial would have been different but for counsel's errors) closely parallels the *Donnelly* standard this court used above to determine whether cumulative error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Any distinction between these two tests does not alter this court's conclusion that Bockting's constitutional rights were not violated. For the same reason it finds that any cumulative error did not result in a deprivation of Bockting's due process rights, this court also finds that Bockting cannot demonstrate a "reasonable likelihood" that the result of his trial would have been different if the jury had not been exposed to any prosecutorial misconduct or evidence of prior bad acts.

Bockting's claim that he was also prejudiced because these issues were not properly preserved for appeal are addressed below.

a. Failure to Raise Issues on Appeal

The *Strickland* standard also applies in evaluating whether appellate counsel was unconstitutionally ineffective. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when such issues would not have provided grounds for reversal. *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

The Nevada Supreme Court maintains an elevated standard for obtaining the reversal of a conviction where the appellant's claim is prosecutorial misconduct or the improper admission of prior bad acts evidence. In either case, the Nevada Supreme Court will not reverse a conviction unless it is persuaded that the result of the defendant's trial would have been different but for the claimed errors. *See, e.g., King v. State*, 998 P.2d 1172, 1175-77 (Nev. 2000). For the reasons set forth herein, Bockting cannot show that there is a reasonable likelihood that the outcome of his trial depended on prosecutorial misconduct or the admission of prior bad acts evidence, even considering the cumulative effect of such claimed error.

C. Conclusion

In summary, this court finds that any errors committed by the state court in convicting Bockting do not rise to the level of constitutional violations justifying habeas relief. In addition, Bockting has not demonstrated that his Sixth Amendment right to effective assistance of counsel was

violated under the *Strickland* test. Consequently, Bockting's petition for federal habeas relief will be denied.

IT IS THEREFORE ORDERED that petitioner's second amended petition for writ of habeas corpus (Docket #35) is **DENIED**. The Clerk shall enter Judgment in respondents' favor and against the petitioner.

Dated this 19 day of March, 2002.

/s/_____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866
D.C. No. CV-98-00764-ECR
District of Nevada, Reno

[Filed April 1, 2004]

MARVIN HOWARD BOCKTING,
Petitioner - Appellant,

v.

ROBERT BAYER,
Respondent - Appellee.

Before: WALLACE, NOONAN, and McKEOWN, Circuit Judges.

ORDER

The parties are directed to file, within twenty-eight (28) days from the date of this order, simultaneous briefs of no more than twenty (20) pages responding to the following questions:

(1) Should this court apply *Crawford*'s new-constitutional rule retroactively to *Bockting*'s collateral proceedings? *See Crawford v. Washington*, 2004 WL 413301 at *13.

(2) Which, if any, of the hearsay accusations admitted at trial are admissible under *Crawford*?

(3) Assuming a Confrontation Clause violation occurred, should this court consider the error harmless and affirm the denial of petition?

(4) Should the petition be remanded to state court for reconsideration in light of *Crawford*?

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 28, 2004]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER,	)
Respondent-Appellee.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLANT'S SUPPLEMENTAL BRIEF

[Table of Contents and Table of Authorities
Omitted in this Appendix]

ISSUES PRESENTED FOR REVIEW

In its order of April 1, 2004, this Court directed the parties to respond to the following questions:

1. Should this Court apply *Crawford*'s new constitutional rule retroactively to *Bockting*'s collateral proceedings?

2. Which, if any, hearsay accusations admitted at trial are admissible under *Crawford*?

3. Assuming a Confrontation Clause violation occurred, should this Court consider the error harmless and affirm the denial of the petition?

4. Should the petition be remanded to state court for reconsideration in light of *Crawford*?

I.

CRAWFORD V. WASHINGTON APPLIES TO THIS CASE

Introduction

Crawford v. Washington, 124 S.Ct. 1354 (2004) removes any doubt that the Nevada Supreme Court's determination that cross-examination of the only witness against Bockting was unnecessary was contrary to and an unreasonable application of clearly established federal law. Throughout the opinion, as detailed below, the Supreme Court makes clear that although there have been deviations in rationale, the results in prior decisions have been consistent with a rule that requires unavailability and prior opportunity to cross-examine before testimonial hearsay evidence may be admitted in a criminal trial. Neither of those conditions was met in Mr. Bockting's trial and *Crawford* tells us that relief would have been granted before the *Crawford* opinion.

Crawford can, and should be, applied retroactively to reach the same result. The issues of whether the rule is a "new rule" and whether it is a "watershed" rule are addressed below. The rule is not new as it is based in the common law and a long line of historical precedent. At the same time, it can be considered a "watershed" rule essential to an accurate and fair proceeding because, to the extent that *Ohio v. Roberts* deviated from bedrock constitutional guarantees, *Crawford* re-established them.

The Non-Retroactivity Principle

In *Teague v. Lane*, 489 U.S. 288 (1989), the court held that generally a habeas petitioner may not benefit from a new

role that was adopted after the defendant's conviction became final. The application of *Teague* involves a three step analysis:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the Court must survey the legal landscape as it then existed and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000), quoting *Caspari v. Bohlen*, 510 U.S. 383 (1994).

There is no question here that *Crawford v. Washington* was decided after Bockting's case became final on direct appeal. To determine, though, whether Mr. Bockting can benefit from the rule announced in *Crawford*, this court must first decide whether the rule is a "new rule" and then whether there is an exception to the *Teague* doctrine which is applicable.

The Holding in *Crawford* Is Not a New Rule

"'[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] if the result was not dictated by precedent existing at the time the defendant's conviction

became final.'" *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2001) quoting *Teague*, *Supra* at 489 U.S. 301. Another way that novelty has been defined is whether the rule "would represent a 'development in the law over which reasonable jurists [could] disagree.'" *Graham v. Collins*, 506 U.S. 461 (1993)(concurring opinion, Souter, J.), quoting *Sawyer v. Smith*, 497 U.S. 227 (1990). The existence of conflicting authority is not enough to support a determination that a rule resolving that conflict is a new one. *Id.*

Assessing the novelty of the rule announced in *Crawford* (since the concurring opinion suggests that the majority opinion overruled *Ohio v. Roberts*, 448 U.S. 56 (1980))[1] might seem to be a foregone conclusion. It is not. The majority opinion makes it clear that the rule adopted in *Crawford* reaches back to "Roman times," was a settled rule of common law by 1696, and was incorporated in the Confrontation Clause by the Framers. *Crawford*, *supra* at 124 S.Ct. 1366, n.5. Moreover, citing a series of cases, **including** *Ohio v. Roberts*[2], which conditioned the admission of "testimonial" evidence on a prior opportunity to cross-examine, the court emphasized that,

> [o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trail have been admitted only where the

---

[1] The majority opinion does not use the term "overruled" when addressing *Roberts*. The majority suggests only that the Roberts opinion "strays" from historical precedent and that its rationale is not consistent with the constitutional principles delineated in the opinion

[2] *Ohio v. Roberts*, *Supra*; *Lilly v. Virginia*, 527 U.S. 116 (1999); *Bourjaily v. United States*, 483 U.S. 171 (1987).

> declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, *supra*, at 124 S.Ct. 1369.

The Supreme Court did not ignore the fact that *Ohio v. Roberts* constituted a departure from the historical principles described in the opinion. Rather, the court explained that "the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales." *Crawford*, *supra*, at 124 S.Ct. 1369[3].

The test, then, is whether the rule in Crawford can be "meaningfully distinguished from that established by binding precedent" at the time that the Nevada Supreme Court applied *Roberts*. *Wright v. West*, 505 U.S. 277 (1992). The majority and concurring opinions agree that, while the rationale of *Roberts* departed from a long line of precedent, the result was consistent with the rule in *Crawford*. Either there is no meaningful distinction from the long line of cases cited in the opinion or the Nevada Supreme Court unreasonably applied the precedent in place at the time it decided this case.

Exceptions to *Teague*'s Non-Retroactivity Rule

If the holding in *Crawford* announces a new rule, then this court must determine whether it is the kind of rule which should be applied retroactively under the two *Teague*

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[3] This discussion in the Supreme Court opinion supports a determination by this court that the Nevada Supreme Court's application of *Ohio v. Roberts* was unreasonable. Chief Justice Rehnquist, concurring in the opinion, would have reversed based upon an application of *Roberts* and *Idaho v. Wright*.

exceptions. A new rule is to be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority." *Teague*, *supra*, at 489 U.S. 307. That exception is not applicable here. The second *Teague* exception appears to be designed for the rule announced in *Crawford* which is based explicitly on the historical understanding of the confrontation guarantee at the time the Constitution was adopted, and thus imposes a procedure "implicit in the concept of ordered liberty." *E.g. Pointer v. Texas*, 380 U.S. 400, 403 (1965)(confrontation is a fundamental right made obligatory upon the states under the Due Process clause). A habeas petitioner can receive the benefit of a new rule that "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307. This court has described the second exception as follows:

> The second exception in *Teague* allows courts to apply certain "watershed rules of criminal procedure" retroactively. These rules must be applied retroactively if a failure to adopt them will result in an impermissibly large risk that the innocent will be convicted and if the procedure at issue implicates the fundamental fairness of the trial.

United States v. Sanchez-Cervantes, 282 F.3d 664, 668-669 (9th Cir. 2002).

Retroactive application is available when the rule improves the accuracy of the trial and changes "our understanding of the 'bedrock procedural elements essential to the fairness of a proceeding.'" *Id.*, quoting *Sawyer v. Smith*, 497 U.S. 227 (1990).

Admittedly, this exception is narrow. The Supreme Court has used the decision in *Gideon v. Wainwright* as an example of the kind of rule which would qualify. *See, e.g., Tyler v. Cain*, 533 U.S. 656 (2001). The requirement of unavailability and opportunity to cross-examine, if it is a new rule, is so fundamental to the fairness of the trial and the accuracy of the outcome that it must be the kind of rule envisioned by the second *Teague* exception.

The language in *Crawford* provides the best evidence that the Supreme Court saw the rule as essential to an accurate and fair proceeding:

Accuracy of the Trial

> Nothing can be more essential than the cross examining [of] witnesses...124 S.Ct. at 1362.
>
> We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. 124 S.Ct. at 1366-67.
>
> ...the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. 124 S.Ct. at 1370.

The ambiguity of [the hearsay statements] made it all the more imperative that they be tested to tease out the truth. 124 S.Ct. at 1373.

...we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. 124 S.Ct. at 1373.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. 124 S.Ct. at 1377 (Concurring Opinion)

Bedrock Principles Essential to Fairness of the Proceeding

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. 124 S.Ct. at 1359.

"[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." 124 S.Ct. at 1363.

...one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." 124 S.Ct. at 1363.

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. This, the law says, he shall under no circumstances be deprived of...." 124 S.Ct. at 1367.
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. 124 S.Ct. at 1374.

In this case, Petitioner was convicted primarily on the basis of the wholly un-cross-examined statements of the alleged victim. Applying the *Crawford* rule here would clearly reduce the "impermissibly large risk that [an] innocent [man] was convicted," and "implicate[s] the fundamental fairness of the trial." *Sanchez-Cervantes*, 282 F.3d at 668-669; *see Dutton v. Evans*, 400 U.S. 74, 89 (1970)(right of cross-examination "helps ensure the 'accuracy of the truth-determining process' [citations omitted]"); *Pointer v. Texas*, 380 U.S. at 405 (cross-examination is "essential and fundamental for...fair trial.")

II.

THE HEARSAY ACCUSATIONS MADE TO THE MOTHER AND TO THE POLICE OFFICER WERE INADMISSIBLE

Statements Taken by the Police

At trial, Detective Zinovitch testified that when he first tried to talk to Autumn Bockting, she wouldn't talk to him. EOR 102. On January 21, 1988, four days after the criminal

conduct was alleged to have taken place, the detective transported Autumn and her mother to his office where he questioned Autumn. EOR 103. Autumn's responses to that interrogation, describing various acts of sexual molestation were admitted into evidence at the trial. EOR 106-113. The opinion in *Crawford* is explicit that "statements taken by police officers in the course of interrogations" are testimonial in nature. 124 S.Ct. at 1364. As such, the declarant must be unavailable and have been subject to prior cross-examination to be admissible. There is simply no question that under *Crawford*, the hearsay accusations of the child brought in through Detective Zinovitch are not admissible.[4]

Statements to the Mother

Laura Bockting, the estranged wife of Appellant, testified that on January 16, 1988, Autumn Bockting, her daughter and Appellant' s stepdaughter "looked like she had just woke up from a bad dream and was quite upset." EOR 142. At first, the child wouldn't tell her why she was upset, so Laura Bockting pressed her, according to her testimony. EOR 142. Laura Bockting testified that she told the child that she "wanted her to tell me what was the matter" and that she "made her go into more detail." EOR 143. The hearsay responses to those questions from her mother were admitted into evidence at the trial. EOR 81-82.

Crawford directly decided only that statements made to police officers were testimonial and thus inadmissible absent

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[4] There were also statements elicited by a counselor engaged by the prosecutor. The child denied that anything had occurred to the counselor. Those statements would also be testimonial and thus inadmissible.

the conditions set forth in the opinion. The court, however, did address what would probably not be testimonial. The court suggests that an "off-hand, overheard remark," while unreliable, does not resemble the civil-law abuses which the Confrontation Clause sought to address. 124 S.Ct. at 1364. The Confrontation Clause applies to "witnesses" or those who "bear testimony," and "testimony" is defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Several examples of the "core class of 'testimonial statements" were listed in the opinion, citing to the parties' briefs: affidavits, custodial examinations, prior testimony, pretrial statements that declarants would reasonably expect to be used prosecutorially, depositions. The court included, as an example of the kinds of statements which might be considered to be testimonial, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 124 S.Ct. at 1364.

The child's statements to her mother were definitely not off-hand overheard remarks. The statements were, on the other hand, statements that were elicited by the mother under circumstances that would lead the declarant to believe that the statements would be available for use at a later trial. Accordingly, while statements other than to police were not specifically decided in *Crawford*, the hearsay introduced through the mother would not be admissible absent unavailability and an opportunity to cross-examine the declarant.

III.

THE CONFRONTATION CLAUSE VIOLATION CANNOT BE HARMLESS IN THIS CASE

The only evidence which connects Mr. Bockting to sexual molestation of Autumn Bockting was the hearsay statements of Autumn introduced through the police officer and her mother. There was no DNA; there was no confession; the mother did not testify that she had seen anything occurring. At the Preliminary Hearing and to the prosecutor-selected counselor, the child denied that the events happened.

Should this court determine that the Confrontation Clause was violated by the admission of the statements of the child to the police officer but the statements to the mother could come in, the error cannot be harmless. Laura Bockting's credibility was at issue due to the rocky relationship between the couple, the fact that she waited over two days to take the child to the hospital, her testimony that immediately after she said she was told about the molestation, she left the child alone with Appellant, and her background as an alcohol and drug abuser. *See* Statement of Facts. The hearsay statements introduced through the police officer were critical to the prosecutor's case in order to corroborate Laura Bockting.

IV.

THE PETITION SHOULD NOT BE REMANDED TO STATE COURT

If this court determines that *Crawford* applies to this case, this court should order that the Writ of Habeas Corpus should be granted and that the matter should be remanded to state court for a new trial.

The matter should not be remanded to the Nevada Supreme Court for reconsideration in light of *Crawford*. Appellant was convicted in 1988. This is his first federal habeas petition. It has taken sixteen years for any court to seriously consider his claims. The delay is primarily attributable to the delays which occurred in the state courts.

If the rule in *Crawford* is applied to this case, reversal of the conviction is required. The Confrontation Clause was violated when the only testimony which connected the Appellant to the crime was in the form of hearsay, there was no demonstration of unavailability and there was no prior opportunity to cross-examine. There is no further record to be made in the state courts and can be no debate as to the appropriate result.

V.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,288.

Respectfully submitted,

/s/

FRANNY A. FORSMAN
Federal Public Defender

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 29, 2004]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER, et al.	)
Respondents-Appellees.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLEE'S SUPPLEMENTAL BRIEF

[Table of Contents and Table of Authorities
Omitted in this Appendix]

I.

STATEMENT OF THE ISSUE

After briefing and argument, the Court entered an Order for the briefing on the question of whether the Supreme Court's decision in *Crawford v. Washington*, ___ U.S. ___, 124 S.Ct. 1354 (2004) should apply retroactively to this habeas corpus appeal.

II.

INTRODUCTION

In *Crawford*, the Supreme Court redefined the test for the admissibility of certain out-of-court statements made by unavailable witnesses, i.e., those made pursuant to "examinations" or which are testimonial in nature, rejecting the "indicia of reliability" standard set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980):

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, e.g., Campbell, 30 S.C.L., at 130... That interrogators are police officers rather than

> magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function...

Crawford, 124 S.Ct. at 1364-1365. The Court held that ex parte statements made to the police for testimonial functions were at the core of their concerns, while many hearsay statements do not implicate the protections of the Sixth Amendment:

> First, the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's... The Sixth Amendment must be interpreted with this focus in mind .... This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.

Crawford, 124 S.Ct. at 1363-1364.

The majority held that various formulations of suspect statements exist:

> Various formulation of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony of its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that

> the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' Brief for Petitioner 23; 'extrajudicial statements ...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' *White v. Illinois*, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S.Ct. 736 (1992). (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); 'statements that were made under circumstances which would lead an objective witness reasonably to that the statement would be available for use at a later trial,' Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Crawford, at 1364.

If the *Crawford* decision were to have any application to the instant matter, it would be based on Justice Scalia's finding that "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. *Crawford*, 124 S.Ct. at 1365. In the instant matter, during the State court trial, after the trial court judge found the child sexual assault victim unavailable, he permitted a police officer, Detective Zinovitch of the Las Vegas Metropolitan Police Department, to testify regarding a statement he had obtained from the child about the sexual assault committed by the Petitioner, under the standard set

forth under *Ohio v. Roberts*, 448 U.S. 56 (1980). See, Appellees' Answering Brief, at 3-6.

If applied to the instant matter, the *Crawford* decision would substantially change the legal analysis applicable to such claims. However, *Crawford* should not be applied retroactively to Bockting's conviction, which was final prior to the date of the *Crawford* decision. Secondly, even if Crawford were applicable to Bockting's case, it would change nothing because the statements made to the officer by the child sexual assault victim about which the officer testified were first made to the child's mother, who also testified about those statements. The admissibility of the mother's testimony regarding the child's statement to her about the assault would be unaffected by the Crawford decision since Crawford applies only to statements made pursuant to police interrogation.

III.

ANALYSIS OF APPLICATION

A. If applied to Bockting's case, The *Crawford* decision would have no effect on the outcome since the testimony of the mother of the child sexual assault victim would still be fully admissible.

It is argued below that the new *Crawford* decision cannot be applied retroactively. However, even if *Teague* could be overridden and the case found to be applicable, it would have no impact on Bockting's case since the testimony of the mother of the child sexual assault victim would still be admissible at trial. As set forth above from the language of the *Crawford* decision, the decision applies only to *ex parte* testimonial-type evidence elicited through police

interrogation. In Bockting's case, statements of the child were admitted pursuant to *Idaho v. Wright*, 497 U.S. 805 (1990), and *Ohio v. Roberts*, 448 U.S. 56 (1980) through two individuals–the child's mother and the investigating officer. See, Answering Brief, at 3-6, 21. The primary witness regarding the child's statements was her mother. Under *Crawford* this testimony would still be admissible since it was not the product of an interrogation. The court will remember the discussion during oral argument about the fact that the child woke at night and reported the assaults to her mother when her mother had no idea about what was troubling the child. See, also, EOR 79-86. Because the testimony of the child's mother would be unaffected by the Crawford decision, since it was not the product of an interrogation, and the evidence of the sexual assault would still be admissible, the Crawford decision would have no effect on Bockting's case.

B. *Crawford* should not be applied retroactively in a collateral attack to a conviction that became final prior to the date of the *Crawford* decision.

The Supreme Court has formulated rules for when a new rule of law would apply retroactively in a collateral attack. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), the Court held that, in most instances, new rules do not apply retroactively. Since *Teague*, therefore, the presumption is against the retroactive application of new rules to cases on collateral attack.

The general principle is that an opinion applying an existing or "old rule" is applicable to collateral attack cases, while a "new rule" applies only to cases that are not final when the decision is announced. A case becomes final when the judgment of conviction has been rendered, the availability of an appeal exhausted, and the time for a petition for

certiorari has elapsed. *Id.*, 489 U.S. at 295, 109 S.Ct. at 1067; *Allen v. Hardy*, 478 U.S. 255, 258, n. 1, 106 S.Ct. 2878, 2880, n. 1 (1986) (declining to apply the *Batson* rule retroactively).

1. The Rule on Retroactivity

In the State court proceedings, the Nevada state courts applied the law as it had been defined by the Supreme Court. *Teague* was designed to avoid punishing the State criminal process after the fact for doing that which was commanded at the time by the Supreme Court. In *Teague*, the Court considered the burden that widespread retroactivity would have on the states' judicial resources and the need for finality in criminal adjudications and held that a new constitutional rule of criminal procedure will not apply retroactively to cases on collateral review unless the new rule falls within one of two exceptions. One, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075. The second exception states that a new rule of constitutional law will be applied if it is a "watershed rule[] of criminal procedure," i.e., if it requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. 311, 109 S.Ct. at 1075.

2. *Crawford* announces a New Rule.

A case announces a "new rule" of constitutional law if the result "was not *dictated* by precedent existing at the time defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis in original). The *Crawford* Court described its decision as revising its doctrine to reflect

more accurately the original understanding of the Confrontation Clause, explicitly rejecting the "particularized guarantees of trustworthiness" test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) and its progeny:

> Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. Roberts conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' 448 U.S., at 66, 65 L. Ed. 2d 597, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: it admits statements that *do* consist of ex *parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations...The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribes method of assessing reliability with a wholly foreign one... The Raleigh trial itself involved the very sorts of reliability determinations that Roberts authorizes...Dispensing with confrontation because testimony is obviously reliable is akin to dispensing

> with jury trial because as defendant is obviously guilty.

Crawford, 124 S.Ct. at 1369-1371.

These words stand as a clear condemnation of the *Roberts* rule. The Court rejected the "open-ended balancing test" it had applied in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) and its progeny and replaced it with a "categorical constitutional guarantee" that the Court ruled was constitutionally prescribed. *Crawford*, 124 S.Ct. at 1373. The Court expressly elected to overrule *Ohio v. Roberts*, instead of following it by simply reweighing its reliability factors and finding that the particular evidence at issue fell short. *Crawford*, 124 S.Ct. at 1373. Clearly, a decision announces a new rule if it expressly overrides a prior decision. *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 897 (1993).

Under these principles, *Crawford* announced a "new rule" within the meaning of *Teague*. Indeed, 'the concurring Justices in *Crawford* characterized the opinion as a "new rule." *Crawford*, 124 S.Ct. at 1378 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

3. Neither *Teague* Exception Applies Here

Crawford does not articulate any prohibition on the power of a criminal law-making authority to proscribe individual conduct. Thus, the first *Teague* exception does not apply.

The second *Teague* exception rests in large part upon the importance of finality. The Court wrote that application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality,

without which the criminal law is "deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1074. "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1075. Moreover, state courts are "understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional commands." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1075 (quoting *Engle v. Isaac*, 456 U.S. 107, 128, n. 33, 102 S.Ct. 1558, 1572, n. 33 (1982)). In the proceedings in the Nevada Supreme Court after remand from the United States Supreme Court, the State High Court did exactly that which the Highest Court had ordered.

In order to satisfy the second *Teague* exception, a new rule must meet two requirements: (1) infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding, *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 2484 (2001) (quotation marks and citations omitted) (declining to apply the *Cage* decision retroactively). The new rule announced in *Crawford* does not meet either component of the second *Teague* exception.

First, the *Crawford* rule does not seriously diminish the likelihood of obtaining an accurate conviction. Cross-examination is admittedly a tool or procedure for determining the reliability of testimony in criminal trials. *Crawford*, 124 S.Ct. at 1373. Similarly, the judicial determination under *Ohio v. Roberts* was also a procedure for determining the

reliability of evidence, albeit one that was not prescribed by the Constitution. *Crawford*, 124 S.Ct. at 1370. The difference between the two procedures is largely whether the judge determines reliability by application of a multi-factored test or whether the jury determines reliability through the process of adversarial testing.

A shift from the judge to the jury as factfinder does not substantially increase the accuracy of the ultimate factual determination. *See United States v. Sanders*, 247 F.3d 139, 149 (4th Cir. 2001) (holding that *Apprendi* should not be applied retroactively); *Bilzerian v. United States*, 127 F.3d 237, 241 (2nd Cir. 1997) (holding that the rule in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995) merely shifts the determination of materiality from the judge to the jury, and thus does not improve accuracy or alter our understanding of the bedrock procedural elements essential to the fairness of a trial).

Furthermore, the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 21, 106 S.Ct., 292, 294 (1985) (emphasis added). Thus guaranteeing the right to cross-examination does not necessarily guarantee effective testing of the testimony that is subject to cross-examination. *See Crawford*, 124 S.Ct. at 1370 (the Confrontation Clause does not demand that evidence be reliable, but that reliability be assessed in a particular manner). Accordingly, the concurring Justices noted in *Crawford* that the Court was adding little to a trial's truth-finding function by requiring cross-examination instead of the *Ohio v. Roberts* procedure. *Crawford*, 124 S.Ct. at 1378 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

Second, the *Crawford* rule does not alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The second Teague exception applies to watershed rules of criminal procedure that are "necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-242, 110 S.Ct. 2822, 2831 (1990). Such a rule must alter our understanding of the "bedrock procedural elements essential to the fairness of a proceeding." *Id.* 497 U.S. at 242, 110 S.Ct. at 2831.

Teague itself observed that procedures qualifying for retroactive application under the second exception "would be so central to an accurate determination of innocence or guilt, *we believe it unlikely that many such components of basic due process have yet to emerge.*" *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077 (emphasis added). Indeed, the Court observed that the second exception was "best illustrated by recalling the classic grounds" justifying a write of habeas corpus -- proceedings dominated by mob violence, knowing use of perjured testimony, or conviction based on confessions extorted from the defendant by brutal methods. *Teague*, 489 U.S. at 313-14, 109 S.Ct. at 1977 (quoting *Rose v. Lundy*, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216-17 (1982) (Stevens, J., dissenting)).

The *Teague* Court concluded that the rule proposed by the petitioner in that case -- that the petit jury be comprised of a "fair cross section of the community" -- was a "far cry from the absolute prerequisite to fundamental fairness that is implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 314, 109 S.Ct. at 1078; *see also Saffle v. Parks*, 494 U.S. 484, 487, 495, 110 S.Ct. 1257, 1259, 1264 (1990).

One case has noted that the United States Supreme Court has refused to apply "new rules" in 11 cases, including the rule announced in the litigation-spawning *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). *United States v. Mandanici*, 205 F.3d 519, 529 (2nd Cir.), *cert. denied*, 531 U.S. 519 (2000). More specifically, lower federal courts have refused to find that the second *Teague* exception applied to specific new pronouncements concerning the Confrontation Clause. *See Garcia v. United States*, 278 F.3d 1210, 1215 (11th Cir.), *cert. denied*, 537 U.S. 855 (2002) (the Confrontation Clause rights implicated in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998) did not meet fundamental fairness prong of *Teague*'s second exception); *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir.), *cert. denied*, 519 U.S. 1016 (1996) (rule announced in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 31139 (1990), which excluded corroborating evidence from consideration in determining reliability did not fit into either of *Teague* exceptions).

The *Crawford* Court identified the Sixth Amendment Confrontation Clause as a "bedrock procedural guarantee." *Crawford*, 124 S.Ct. at 1359. However, this does not mean that the rule adopted in *Crawford* is itself a bedrock procedural guarantee. Although the Confrontation Clause, itself, is a "bedrock procedural clement," rules announcing how to implement the Clause may not themselves qualify as such. As the United States Court of Appeals for the Tenth Circuit noted in *Johnson v. McKune*, 288 F.3d 1187 (10th Cir.), *cert. denied*, 537 U.S. 1050 (2002);

> Not every holding that draws on a wellspring rule is itself a wellspring holding. "Watershed principles in turn spawn numerous subsidiary questions, which are closer to the constitutional margins. These subsidiary questions may qualify as arguable applications of a

> bedrock principle, but they are not core guarantees themselves."

Johnson v. McKune, 288 F.3d at 1199 (citations omitted). *Crawford* clarified that cross-examination is a requirement under the Confrontation Clause in admitting "testimonial" statements, but it did not alter our understanding of what constitutes "confrontation."

Another consideration in determining whether a new rule is a watershed decision that falls under the second *Teague* exception is whether error in applying the new rule is subject to plain or harmless error review. *See Coleman v. United States*, 329 F.3d 77, 90 (2nd Cir.), *cert. denied*, 124 S.Ct. 840 (2003) ("it would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural'--i.e., that they do not inherently deprive defendants of 'basic protections,' or 'substantial rights' -- and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure") (citations omitted); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), *cert. denied*, 537 U.S. 1098 (2002) (reasoning that since *Apprendi* error can be excused as harmless error where evidence is overwhelming, *Apprendi* cannot be considered a watershed decision that is fundamental to due process). *Compare Summerlin v. Stewart*, 341 F.3d 1082, 1119 (9th Cir. 2003) ("[t]hat *Ring* error is structural is a critical consideration in determining whether the second *Teague* exception has been satisfied"), *cert. granted*, 124 S.Ct. 833 (2003).[1]

The United States Supreme Court has held that error arising from violation of the Confrontation Clause is subject

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[1] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986).

Nothing in *Crawford* suggests otherwise. Because violations of the Confrontation Clause do not constitute structural error, the second *Teague* exception is not implicated. Although *Crawford* provides defendants with significant procedural protections in criminal proceedings, the standard required to apply a rule retroactively is high, and has not been met here.

IV.

CONCLUSION

For the reasons set forth above, the *Crawford* case has no application to the instant proceedings.

DATED this 29th day of April, 2004.

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By: /s/
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed February 22, 2005]

MARVIN HOWARD BOCKTING,
Petitioner-Appellant,

v.

ROBERT BAYER,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-98-00764-ECR
Edward C. Reed, District Judge, Presiding

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

OPINION

McKEOWN, Circuit Judge

Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Autumn's statements at the interview contradicted her testimony at a preliminary hearing where she claimed not to remember what happened with her

father. Admission of the interview evidence without cross-examination violated Bockting's constitutional right "to be confronted with the witnesses against him." U.S. Const. amend. VI.

Although this case has been before the Nevada Supreme Court twice and before the United States Supreme Court on one occasion, resolution now rests on interpretation of an intervening Supreme Court case: *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court definitively held that "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." 124 S. Ct. at 1369. Because the little girl's testimony, which was not subject to cross-examination, was central to the conviction, its admission can hardly be classified as harmless error. *Crawford* dictates reversal.

The thorny issue is whether *Crawford* applies retroactively to this state habeas appeal. In an earlier case, we reserved this question for future consideration. *See Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (per curiam). If, as Judge Noonan argues, *Crawford* simply reiterates a longstanding rule and does not announce a new rule, then retroactivity falls out of our analysis. If, on the other hand, *Crawford* is characterized as a "new rule," then we are faced with analyzing the retroactivity of *Crawford* in the framework of yet another recent Supreme Court case, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). New rules apply retroactively only where they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or where the new rule is "implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307, 109

S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The latter category is "reserved for watershed rules of criminal procedure." *Id.* at 311.

The threshold question is whether *Crawford* constitutes a "new rule" under *Teague*. Judge Noonan's approach--namely that *Crawford* does not announce a new rule but rather is a "correction of a misinterpretation," Concurrence at 2015--has a certain appeal in light of the Court's historical emphasis in *Crawford*. Indeed, one can read *Crawford* as intimating that the rule is longstanding. Unfortunately, Justice Scalia's analysis is not entirely consistent with that viewpoint. Nonetheless, characterizing *Crawford* as something less than a new rule, as Judge Noonan does, is one legitimate way of interpreting *Crawford*. To do so leads to the same result here--the application of *Crawford* to Bockting's pending habeas claims.

Despite the appeal of Judge Noonan's reasoning, application of the Supreme Court's guidance in *Teague* leads to the conclusion that *Crawford* announces a "new rule." Because the *Crawford* rule is both a "watershed rule" and one "without which the likelihood of an accurate conviction is *seriously* diminished," *Summerlin*, 124 S. Ct. at 2523, the rule is retroactive.

I. FACTUAL BACKGROUND

Marvin Bockting lived with his wife, Laura, and his two daughters, Autumn and Honesty, in a motel in Las Vegas. Autumn had taken showers together with Laura and Bockting. She had also seen them having sex, and she was accustomed to the use of sexual language.

One Saturday night, when Laura was at home alone with the children, Autumn Bockting woke up crying. Her mother observed that "she looked like she had just woken up from a bad dream and she was quite upset." At first she refused to tell Laura what was wrong. Laura asked why she wouldn't tell. Autumn told her, "Because daddy said that you would make him leave and that he would beat my butt if I told you." After reassurance from her mother, Autumn said "daddy put his pee-pee in her pee-pee, and that daddy put his pee-pee in her butt, and daddy made her suck on his pee-pee like it was a sucker."

The next day, Laura confronted Bockting. She asked him to leave, which he did. Two days later, a Tuesday, Laura called the rape crisis hotline and was told to take Autumn to the hospital, where they were met by Detective Zinovitch. Zinovitch tried to interview Autumn, but she was too upset. A rape examination was performed. The doctor found that Autum's rectal sphincter had been torn within the past week. She also found that Autumn's hymenal ring was wide open, a rarity in a six-year old. The doctor determined that although she "couldn't determine what kind of instrument or foreign body was used to cause the laxness of the hymen and the fissure of the rectum," it had been caused by a blunt force. Two days later, Autumn was again interviewed by a detective. She repeated what she had told her mother, accurately describing the positions of the sex acts. She also demonstrated the acts with anatomically correct dolls.

At Bockting's preliminary hearing, Autumn was able to answer questions about the difference between the truth and a lie, but became upset when she was asked about being touched by Bockting. Upon further questioning, she said she could not remember what occurred with her father and did not remember whether she had talked with the detective about the

claimed assault. The judge declared Autumn an unavailable witness, and the preliminary hearing proceeded with the testimony of Laura and Zinovitch. At trial, the judge found that Autumn's hearsay statements were admissible because she was effectively unavailable for trial. Without having the opportunity to cross-examine Autumn, Bockting was convicted and sentenced to life in prison.

Bockting appealed to the Nevada Supreme Court, which dismissed his claims. The United States Supreme Court later vacated the Nevada Supreme Court's decision, remanding for consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). In 1993, the Nevada Supreme Court affirmed Bockting's conviction. He filed a second petition for post-conviction relief, which the state district court denied in 1994. Three years later, the Nevada Supreme Court again dismissed the appeal. Bockting then sought relief in federal court. He timely filed a habeas petition in 1998, which he amended in 2000. The district court denied the petition, and Bockting filed the present appeal.

II. DISCUSSION

Because Bockting filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), its provisions apply. *See Woodford v. Garceau*, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Under AEDPA, habeas relief to a state prisoner is available only if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court also directs us that "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *See Horn v. Banks*, 536 U.S. 266, 272, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002). Indeed, as the Court noted, "if our post-AEDPA cases suggest any-thing about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." *Id.*

In explaining *Teague*'s application, the Supreme Court recently explained that there are three steps to determining whether a rule of criminal procedure applies on collateral review:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004) (internal citations omitted). Because Bockting's conviction became final in 1993, we must evaluate whether any subsequent rule of constitutional law is new against the benchmark of that year.

A. *CRAWFORD* ANNOUNCED A NEW RULE

The question before us is whether the Confrontation Clause principles stated in *Crawford* amount to a new rule. In *Crawford*, the Supreme Court considered whether Washington

State's use at trial of a witness's tape-recorded statement to a police officer violated the Confrontation Clause. 124 S. Ct. at 1357. Writing for the Court, Justice Scalia engaged in a lengthy historical analysis of the Confrontation Clause, noting that "the principal evil at which the Confrontation Clause was directed was the *civil-law mode of criminal procedure*, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 1363 (emphasis added). He went on to emphasize "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and* the defendant had had a prior opportunity for cross-examination." *Id.* at 1365 (emphasis added).

Whether the rule in *Crawford* is new depends on whether it "was *dictated* by the then-existing precedent." *Beard*, 124 S. Ct. at 2511. To be sure, the majority in *Crawford* is somewhat opaque as to the categorization of its ultimate holding. As the Court noted, "although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales." 124 S. Ct. at 1369. The puzzler is whether the "results of [the Supreme Court] decisions" are coextensive with the rules of those decisions. If so, then the *Crawford* pronouncement could be legitimately viewed as a continuation of Supreme Court jurisprudence. Careful scrutiny of the *Crawford* opinion suggests otherwise for at least two reasons: (1) *Crawford* deviates from the test announced in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); and (2) simply reaching the right "result" does not mean that the result flowed from a constant rule.

As the Court observed, "*Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears particularized

guarantees of trustworthiness." *Crawford*, 124 S. Ct. at 1369 (quoting *Roberts*, 448 U.S. at 66). *Roberts* rests on evidentiary principles of reliability and trustworthiness rather than on the constitutional principle of confrontation.

The *Crawford* majority quite clearly states that the *Roberts* "test departs from the historical principles" in that it is both "too broad" and "too narrow." *Crawford*, 124 S. Ct. at 1369. *Crawford* did not announce the same rule as *Roberts*. Whereas *Roberts* countenanced the admission of witness testimony if trustworthy, under *Crawford* the testimony is admitted only if the witnesses are subject to cross-examination. The Court concluded that the cases applying *Roberts* have "remained faithful to the Framers' understanding," *id.* at 1369, that testimonial statements are admissible only when two criteria are met: unavailability and opportunity for cross-examination. In other words, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. Although historical principles are the bedrock for the *Crawford* decision, getting back to the bedrock required the Court to disavow the *Roberts* test. The dissent in *Crawford* mirrors this view by concluding that "the Court of course overrules *Ohio v. Roberts*," *id.* at 1378, and criticizing the "Court's adoption of a new interpretation of the Confrontation Clause. . . . ," *id.* at 1374.

To say that the outcomes or "results" have been generally "faithful to the original meaning" is not the same as saying that there has been a consistent rule throughout our history. Indeed, the *result* in an individual case may well be consistent with the Supreme Court's new interpretation of *Crawford*, but that does not mean that the rule that dictated the prior result is necessarily consistent with *Crawford*. The majority in fact

underscores the dichotomy between outcomes and rules in announcing that, "if nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached." *Id.* at 1369 n.9. Rules and outcomes are neither the same nor wholly overlapping.

Finally, the Court in *Crawford* pinpointed a situation that was, in fact, "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial." *Id.* at 1368 n.8. Citing *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), the Court described a case remarkably similar to ours, in which "statements of a child victim to an investigating police officer [were] admitted as spontaneous declarations." *Id. White* rested on the issue of the unavailability requirement under the Confrontation Clause; had *Crawford* been the rule at the time, the lack of cross-examination would have been fatal to the admission of the evidence.

Although the long line of Confrontation Clause cases is "faithful to the original meaning" of the clause, *id.* at 1369, we cannot overlook *Roberts* and *White*. On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that *Crawford* announces a new rule that must be put through the *Summerlin* strainer. If, on the other hand, *Crawford* does not announce a new rule--the position taken by Judge Noonan--then the *Summerlin* analysis is not required. Either way, the result in this case is the same. Bockting's petition should be granted.

B. *SUMMERLIN* CONTROLS THE RETROACTIVITY ANALYSIS

Because *Crawford* announces a new rule, we must ask whether it falls into one of the two *Teague* exceptions to the

bar on retroactivity. The first *Teague* exception is for primary conduct that cannot be criminalized. The second is for bedrock rules of criminal procedure. *Teague*, 489 U.S. at 307. It is the second exception that is at play in this case.

The *Crawford* rule does not narrow the scope of a criminal statute by interpreting its terms, nor is it a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish. *Summerlin*, 124 S. Ct. at 2522. Rather, the rule in *Crawford* is procedural. *See also Crawford*, 124 S. Ct. at 1370 (stating the Confrontation Clause provides "a procedural rather than a substantive guarantee"). Therefore, *Crawford* merits retroactive application only if it implicates "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), and reworks our understanding of bed-rock criminal procedure, *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

To be sure, under *Summerlin*, the lower courts are tightly constrained in determining whether a new rule is a "watershed rule" that is not only fundamental, but one "without which the likelihood of an accurate conviction is seriously diminished." *Summerlin*, 124 S. Ct. at 2523 (quoting *Teague*, 489 U.S. at 313). Viewing *Crawford* and *Summerlin* together poses a conundrum. Justice Scalia wrote for the majority in both cases. In *Summerlin*, the Court admonished that "this class of [retroactive] rules is extremely narrow, and it is unlikely that any . . . has yet to emerge." 124 S. Ct. at 2523 (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotations omitted). Nonetheless, the bar is not absolute and the *Crawford* rule meets the Court's criteria. Admonitions

such as in *Summerlin* offer discouragement but no guidance. Because our job is not to conjure up hidden meaning, we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of *Summerlin*. Viewing *Crawford* in light of *Summerlin* leads to the conclusion that the *Crawford* cross-examination requirement merits retroactive application.

That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question. *Crawford*, 124 S. Ct. at 1359. Hundreds of years of tradition have embedded this notion as a fundamental role. Indeed, "the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Id.* at 1373.

The question next posed is whether the rule implicates the accuracy of the criminal proceeding. Juxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the criminal proceeding," *Saffle*, 494 U.S. at 495, and alters our understanding of bedrock procedural principles, whereas the sentencing scheme in *Summerlin* did not. In *Summerlin*, the Court concluded that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating factors in a death penalty case must be proved to a jury rather than to a judge, was not a retroactive rule. *Summerlin* asked "whether judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (citations and quotations omitted). The answer was no because "the evidence is simply too equivocal to support that conclusion." *Id.*

In *Summerlin*, the Court observed that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[1] In contrast, the

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[1] The Court rejected the notion that the jury trial right seriously impacted accuracy in part because the jury-free civil law system is so prevalent:

> "The mixed reception that the right to jury trial has been given in other countries . . . surely makes it implausible that judicial factfinding so *seriously* diminishes accuracy as to produce an impermissibly large risk of injustice." 124 S. Ct. at 2525 (internal quotations omitted).
>
> Unlike the "mixed reception that the right to jury trial has been given in other countries," *id.*, the right of confrontation is well established in international practice. Justice Scalia noted in *Crawford* that "the right to confront one's accusers is a concept that dates back to Roman times." *Crawford*, 124 S. Ct. at 1359. He then went on to chronicle the history in England. Although not mentioned in *Crawford*, it bears noting that the right of confrontation is firmly implanted in the jurisprudence of other European countries. For example, the European Convention on Human Rights, articles (6)(1) and (6)(3)(D), give the right "to examine or have examined witnesses against him." The European Court of Human Rights has established a right of confrontation: *Saidi v. France*, 17 Eur. Ct. H.R. 251, 270 (1993) ("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial"). *See also Van Mechelen v. Netherlands*, 25 Eur. Ct. H.R. 647, 673 (1997); *Ludi v. Switzerland*, 15 Eur. Ct. H.R. 173 (1992); *Windisch v. Austria*, 13 Eur. Ct. H.R. 281 (1990); *Delta v. France*, 16 Eur. Ct. H.R. 574 (1990); *Kostovski v. Netherlands*, 12 Eur. Ct. H.R. 434, 448-49 (1989).

evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal.

The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy. *See, e.g.*, *Crawford*, 124 S. Ct. at 1370 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth.") (quoting 3 Blackstone, Commentaries * 373); *White v. Illinois*, 502 U.S. 346, 355, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (evaluating a Confrontation Clause claim against the benchmark of accuracy); *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) (describing the "Confrontation Clause's very mission" as "to advance the accuracy of the truth-determining process in criminal trials") (internal quotation omitted); *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (stating the purpose of the Confrontation Clause is to "augment accuracy in the factfinding process"); *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) (plurality) ("The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials."); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'"); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) ("Probably no one, certainly no one experienced in the trial of lawsuits, would

deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."); *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) (describing the "primary object" of the Confrontation Clause as "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). *See also* M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better") (quoted in *Crawford*, 124 S. Ct. at 1370).

But accuracy and reliability do not exist in a vacuum. Rather, "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. "The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Even more to the point, the Court wrote, "the combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor by the trier of fact--serves the purposes of the Confrontation Clause by *ensuring that evidence admitted against an accused is reliable* and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Id.* at 846 (emphasis added).

Crawford itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach" *Summerlin*, 124 S. Ct. at 2525 (internal quotations omitted):

- "The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 124 S. Ct. at 1371.

- "The [general reliability] test is *inherently*, and therefore *permanently*, unpredictable. *Id.* at 1374 n.10. "It is difficult to imagine [the general reliability framework] providing any meaningful protection in [politically charged cases]." *Id.* at 1374.

- "We view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373.

Thus, at the heart of the Court's concerns in *Crawford* was the *reliability* of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined. That the rule in *Crawford* is one without which the accuracy of convictions would be seriously undermined is further born out by the Court's own description of its prior doctrine as a "rare case" of "fundamental failure." *Id.* at 1373. The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an

"absolute pre-requisite to fundamental fairness." *Sawyer*, 497 U.S. at 244.

In *Crawford*, the Court itself faults the previous regime under *Roberts*. *Crawford*, 124 S. Ct. at 1371-73. Indeed, to benchmark reliability against *Roberts* would undermine *Crawford*'s central thesis. Reliance on *Roberts*' judicially-administered reliability test gives illusory comfort, as "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370, and "the legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception," *id.* at 1371.[2]

The retroactivity inquiry is not conducted in a vacuum. Rather, the analysis is modeled on the *Summerlin* requirements. But even if a "look back" to *Roberts* were appropriate, as Judge Wallace suggests, *Crawford* would be retroactive.

Rules that are properly considered retroactive are those that "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (internal quotations omitted). As the Court recently stated, "in providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)." *Beard*, 124 S. Ct. at 2514 (citing

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[2] Judge Wallace's effort to rest the analysis on the reliability test under *Roberts* forces a false dichotomy between reliability and cross-examination and overlooks the fact that "some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." *Id.* at 1372.

Saffle, 494 U.S. at 495, *Gilmore v. Taylor*, 508 U.S. 333, 364, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (Blackmun, J., dissenting)). Recognizing that bedrock procedural rules are very few in number, it is no leap to conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*.

We join one other circuit that has concluded that *Crawford* announces a new rule, although its retroactivity analysis differs from ours. *See Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004). The Second Circuit did not directly address the new rule issue but concluded that even if *Crawford* did announce a new rule, it would not be retroactive. *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004).

Addressing the question of a new rule, the Tenth Circuit reasoned as follows:

> As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant. Crawford, 541 U.S. 36 , 124 S. Ct. at 1369. Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law. *See Crawford*, at ___, 124 S. Ct. at 1374 (Rehnquist, C.J., dissenting) (referring

> to the majority's holding as a "new interpretation of the Confrontation Clause").

Brown, 381 F.3d at 1226. Our analysis is in accord.

But the Tenth Circuit diverges from us in holding that *Crawford* is not retroactive because it does not set forth a watershed rule of criminal procedure. *Id.* Stating that unless a new rule is "on the magnitude of the rule announced in *Gideon v. Wainright*," it will not fit within the *Teague* watershed rule exception, the court explained:

> Unlike *Gideon*, *Crawford* does not 'alter[] our understanding of what constitutes basic due process,' but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process.

Id. at 1226-27 (internal citations omitted).

The Supreme Court's Confrontation Clause jurisprudence in *Crawford* cannot be dismissed as a mere tweak on the admissibility of hearsay. *See Brown*, 281 F.3d at 1226. The Supreme Court surely did not conceive of it as such. Rather, the Court describes the right of confrontation as a "bedrock procedural guarantee," notes that it "dates back to Roman times" and was part of the common law known to the founding generation. *Crawford*, 124 S. Ct. at 1359. The Court also contrasts "exclusion under the hearsay rules" with "the civil-law abuses the Confrontation Clause targeted." *Crawford*, 124 S. Ct. at 1364. In a rare *mea culpa*, the Court

faults itself for not enunciating the *Crawford* rule earlier, stating that "it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373. There is nothing "mere" about the *Crawford* rule.

The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction. *Summerlin*, 124 S. Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. *See Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, a rule of constitutional law could be essential to promote accurate convictions, but still subject to harmless error review if the impact of misapplication of the rule were easily measurable. In short, because accuracy and measurability are different concepts, whether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure.

After assuming that *Crawford* announced a new rule, the Second Circuit rejected retroactivity, reasoning that the *Crawford* rule would not improve overall accuracy because "it is likely to improve accuracy in some circumstances and diminish it in others." *Mungo*, 393 F.3d at 335. The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment. The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy, *see, e.g.*, *Tennessee v. Street*, 471 U.S.

409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985), and thus *Crawford* rejected the *Roberts* framework as reflective of "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion," *Crawford*, 124 S. Ct. at 1373. Viewing these holdings together leads to the conclusion that the *Crawford* rule is one without which the likelihood of accurate conviction is seriously diminished.

C. BOCKTING MERITS RELIEF UNDER AEDPA

Having determined that *Crawford* is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context. Further, it appears that Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions. *See* 28 U.S.C. § 2254(e) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.") But even if Congress' intent is unclear, the constitutional doubt cannon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

The Nevada Supreme Court relied on *Roberts* to conclude that Autumn was "unavailable" and that her statements bore the requisite "particularized guarantees of trustworthiness." *Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1367-70 (Nev. 1993). As we now know, but the Nevada Supreme Court could not have divined, *Crawford* dictates the right to cross-examine the witness. The progeny of *Roberts*, such as the multi-factor reliability test developed in *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (9th Cir. 1990), cannot override the right of confrontation. Thus, the Nevada Supreme Court's decision was "contrary to" established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*.

It bears noting that *Crawford* requires not only cross-examination but unavailability. We have long acknowledged the sensitive situation presented by the child witness. *See, e.g., Tome v. United States*, 513 U.S. 150, 166, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). Indeed, prosecutions for child abuse often rely heavily on such testimony. Here, the trial court's inquiry into Autumn's unavailability was truncated and conclusory at best. When she refused to cooperate, the court simply declared her unavailable. Although this issue is

troubling, it is not necessary to reach this question because of the constitutional error related to the lack of cross-examination.

The final question is whether admission of Autumn's statement is harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict. Thus, admitting Autumn's statement was not harmless beyond reasonable doubt.

III. CONCLUSION

Because a majority concludes that *Crawford* must be applied in this pending habeas case, Bockting's petition for a writ of habeas corpus is GRANTED.[3]

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[3] I join part II of Judge Wallace's concurring and dissenting opinion with respect to admission of prior misconduct, vouching, and ineffective assistance of counsel.

CONCURRENCE

NOONAN, Circuit Judge, concurring:

The trial court, the state supreme court, and the federal district court believed that the statute was constitutional, the procedure followed to have been proper, and Bockting's conviction valid. It is now apparent that each of these courts was mistaken and that the statute and the procedure under it are unconstitutional. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Bockting is entitled to a writ of habeas corpus. The misunderstanding of the law governing the case is comprehensible in the light of the history set out in *Crawford*; nontestimonial hearsay is not subject to an absolute bar. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

Autumn was not found to be as unavailable as a witness. She was in fact present at the trial. At most, the Nevada courts determined that Autumn was not willing to be a witness against Bockting. The reasons for her unwillingness were not explored. The possibility of measures short of appearance on the stand in open court were not explored. The fact that she had testified at Bockting's preliminary hearing and had denied the accusations against him was ignored. On the mere ipse dixit of a prosecutor already disappointed by Autumn's testimony at the preliminary hearing, she was disqualified as a witness and the hearsay introduced. The Confrontation Clause of the Sixth Amendment to the Constitution of the United States, applicable by virtue of the Fourteenth Amendment, was violated.

No opportunity for cross-examination by Bockting ever existed. He was, of course, not present when Autumn spoke to her mother or when she spoke to Detective Zinovitch. Totally untested by the method constitutionally required, the two testimonial tales, retold by Laura and the detective, confronted Bockting at his trial. The Confrontation Clause demanded that he be confronted with the witness against him. U.S. Const. amend. VI.

It is a work of supererogation to praise the wisdom of the Founders and to celebrate the enforcement of a "bedrock procedural guarantee." *Crawford*, 124 S. Ct. at 1359. Nonetheless, the circumstances of this case demonstrate how wise it is to exclude testimony untested by cross-examination. Autumn's first declaration, reported only by her mother, was made at night after Autumn awoke from sleep crying and was questioned by her mother. It may have been an excited or spontaneous utterance but one made under circumstances rendering it less, not more credible. In her mother's words, "She looked like she had just woke up from a bad dream and she was quite upset." It is a commonplace phenomenon for people of all ages to have nightmares and to awake in distress. What they then say was bothering them carries no guarantee of trustworthiness; they are coming out of sleep, still responding to their sleeping state impressions. Autumn's second declaration was made to a police officer in the presence of her mother; she was under psychological compulsion not to let her mother down. As to her play with the dolls and her sexual experience, her mother testified that Autumn had observed her and Bockting having sexual intercourse in the one bedroom trailer in which the family lived and where Autumn slept in a closet area off the bedroom. The language Autumn used in reference to the sexual organs was language her mother testified that she used in discussion with her. Autumn had no motive to accuse her

stepfather of criminal assault and, in fact, demonstrated affection for him; she did have a motive to account for her nightmare and to tell the same story the second time when she met the police.

Autumn's statements were further put in doubt by her repudiation of any accusation against Bockting at his preliminary hearing. Further, the report of her statement of her mother must be contextualized by these facts: her mother was an exotic dancer, who sometimes performed in front of Autumn; her mother was in conflict with Bockting and on the brink of leaving him; her mother did not report Autumn's nighttime declaration until two days after she said she heard it.

It is argued that to apply *Crawford* is to apply it retroactively. To the contrary, the Supreme Court, after reviewing its own decisions, declared:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, 124 S. Ct. at 1369. *Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue.

True, the chief justice's dissent declared that *Crawford* was "a new interpretation" that overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Id.* at 1374. But as the Court pointed out, *Roberts* itself only admitted testimony that had been subjected to cross-examination. *Id.* at 1368. Undoubtedly, a number of courts misinterpreted the Confrontation Clause in the same way as

the Nevada courts did. But correction of a misinterpretation does not create a new rule. It is dangerous to take literally a dissent. The authentic interpretation of what the Court is doing comes from the Court itself. If there were any doubt in this case (which I deny there is), it is completely dispelled by the Court, again speaking through the author of *Crawford* in the same term in which *Crawford* was decided. Addressing new procedural rules without which the likelihood of an accurate conviction is seriously diminished, the Court declared: "This class of rules is extremely narrow and it is unlikely that any . . . has yet to emerge." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2522, 159 L. Ed. 2d 442 (2004) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (alterations and quotation marks omitted). This declaration is an authoritative determination, delivered less than four months after *Crawford*, that *Crawford's* bedrock procedural rule was not a new rule. A change in rationale is not treated by the Supreme Court as a change in rules. *Crawford*, 541 U.S. 36, 124 S. Ct. 1354 at 1369, 158 L. Ed. 2d 177. All along, the bedrock was there.

As an alternative to the foregoing analysis and in order to provide a precedent for this court, I also concur in Judge McKeown's analysis and opinion.

Because the action of the Nevada Supreme Court resulted in a decision that was contrary to established federal law as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), the writ of habeas corpus should issue to free Bockting from his unconstitutional confinement.

DISSENT

WALLACE, Senior Circuit Judge, concurring and dissenting

Both Judges McKeown and Noonan conclude that the Supreme Court's recent landmark decision, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), governs our consideration of Bockting's Confrontation Clause claim, although for different reasons. While Judge Noonan would hold that retroactivity is "not an issue" because *Crawford* did not establish a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Ante* at 2015, I concur with that part of Judge McKeown's opinion holding that *Crawford* established a new rule that does not apply retroactively to state convictions on habeas review unless it satisfies one of two narrow exceptions. However, I do not agree that *Crawford* fits within either of those exceptions. Guided by the principles outlined in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), I would hold that *Crawford's* new procedural rule does not qualify for retroactive application and would analyze Bockting's Confrontation Clause claim under pre-*Crawford* jurisprudence. In doing so, I would reject that claim, as well as Bockting's remaining claims, under the deferential standards of review embodied in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and affirm

the district court's denial of Bockting's habeas petition.[1] I therefore respectfully dissent.

I.

I consider first Bockting's contention that the state trial court violated his rights under the Confrontation Clause by admitting Autumn's out-of-court statements.

A.

Several weeks after this case was argued before us and submitted for decision, the Supreme Court issued *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Parting ways with the constitutional test formulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *Crawford* held that in criminal proceedings, "testimonial statements of witnesses absent from trial [are admissible] only where the defendant is unavailable, and *only where the defendant has had a prior opportunity to cross-examine*." *Crawford*, 124 S. Ct. at 1369 (emphasis added).

Bockting argues--and Judge Noonan agrees--that *Crawford* does not raise retroactivity concerns at all because it does not qualify as a "new rule" under *Teague*. Although the Supreme Court took great pains to harmonize *Crawford's* result with previous Sixth Amendment decisions, I agree with Judge McKeown that *Crawford's ratio decidendi* effected a clear

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[1] Judge McKeown concurs in part II of this opinion. *See* Ante at 2012 n.3. Therefore, a majority of the court agrees that Bockting's challenges to (a) the admission of evidence of prior misconduct, (b) vouching, and (c) effective assistance of counsel, do not warrant habeas relief.

and decisive break from prior precedent. *See Crawford*, 124 S. Ct. at 1369 (observing that "although the results of our decision have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales"). Before *Crawford*, controlling precedent permitted courts to admit hearsay evidence against a criminal defendant whenever the declarant was "unavailable" and the evidence had "adequate 'indicia of reliability,'" i.e., fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. *Crawford*, however, emphatically rejected *Roberts's* approach to testimonial evidence, arguing that its test demonstrated an "unpardonable . . . capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 124 S. Ct. at 1371. As the Court in *Crawford* explained:

> [*Roberts*] is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability.

Id. at 1369. Responding to these concerns, the Court limited *Roberts's* reach to cases "where nontestimonial hearsay is at issue." *Id.* at 1374. In cases involving "testimonial evidence," the Court replaced *Roberts* with a new test that has two requirements: "unavailability and a prior opportunity for cross-examination." *Id.* Thus, since *Crawford* overruled *Roberts's* test for the admission of testimonial evidence, the decision also represents a "new rule" for retroactivity purposes. *See id.* at 1378 (Rehnquist, C.J., concurring)

(characterizing the majority's opinion as a "new rule"); *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) ("There can be no dispute that a decision announces a new rule if it expressly overrules a prior decision . . . ."); *Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

Crawford's "new" constitutional rule would only apply retroactively to final convictions on collateral review if it falls within certain categories of rules. The Supreme Court recently clarified the nature and scope of these categories in *Summerlin*:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure'

> implicating the fundamental fairness and accuracy of the criminal proceeding."

124 S. Ct. at 2522-23 (citations omitted), *quoting Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), *and Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

Measured against *Summerlin's* standards, *Crawford* is best classified as a procedural rule. The rule does not "narrow the scope of a criminal statute by interpreting its terms"; nor does it "place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. Rather, by renegotiating the boundaries between admissible and inadmissible evidence, *Crawford* operates solely on a defendant's criminal *proceedings*. *Crawford's* characterization as a procedural rule is further supported by the *Crawford* decision itself. By labeling the Confrontation Clause as "a procedural rather than a substantive guarantee . . . [that] reflects a judgment . . . about how reliability [of testimonial evidence] can best be determined," the Court endeavored to reinstitute "the constitutionally prescribed *method* of assessing reliability." *Crawford*, 124 S. Ct. at 1370 (emphasis added). While, the line between "substance" and "procedure" may not always be crystal-clear, there can be no serious dispute that *Crawford's* restriction on testimonial evidence is a "procedural" rule.

Bockting contends that *Crawford* merits retroactive application here because it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *citing Teague*, 489 U.S. at 311; *see also Teague* 489 U.S. at 307 (describing this exception as applying to "those procedures that . . . are implicit in the concept of ordered liberty"

(quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937))). This argument--which Judge McKeown finds persuasive--admittedly has some intuitive appeal; as Bockting observes, the Supreme Court has described "the Sixth Amendment's right of an accused to confront the witnesses against him" as "fundamental," *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), and *Crawford* purports to effectuate the Confrontation Clause's original design and thereby enhance the fairness and accuracy of defendants' criminal proceedings. *Crawford*, 124 S. Ct. at 1373. However, the fact that *Crawford* is "'fundamental' in some abstract sense is not enough" to entitle Bockting to habeas relief. *Summerlin*, 124 S. Ct. at 2523. Under *Teague* and its progeny, *Crawford* does not constitute a "watershed rule" suitable for retroactive application unless the *Roberts* test "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." *Id.* at 2525, *quoting Teague*, 489 U.S. at 312-13; *see also id.* at 2523 ("This class of rules is extremely narrow, and 'it is unlikely that any . . . ha[s] yet to emerge.'" (*quoting Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotation marks and citation omitted)).

In evaluating the *Roberts* test, the Supreme Court's analysis in *Summerlin* is instructive. The question presented there was whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court's decision that juries must determine the existence of any aggravating factor necessary for imposition of the death penalty, applied retroactively to cases already final on direct review. In assessing whether *Ring* represented a true "watershed" procedural rule, the court reviewed scholarly commentary relating to the accuracy of judicial factfinding and concluded that the evidence was "simply too equivocal" to justify *Ring's*

retroactive application: "when so many presumably reasonable minds continue to disagree over whether juries are better factfinders . . ., we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Summerlin*, 124 S. Ct. at 2525. The Court also stressed that this conclusion followed logically from its observation in *DeStefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308 (1968) (per curiam), "that, although 'the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . we would not assert . . . that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" *Summerlin*, 124 S. Ct. at 2525, *quoting DeStefano*, 392 U.S. at 633-34 (internal quotation marks omitted). The Court reasoned that if "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Id.* at 2526. *Summerlin* thus did not extend *Ring* retroactively to cases on habeas review notwithstanding the Court's recognition that "the right to jury trial is fundamental to our system of criminal procedure." *Id.*

Although *Summerlin* does not directly control the outcome of this case, the close similarities between the two cases are compelling. As in *Summerlin*, there is no clear consensus over the comparative effects *Roberts* and *Crawford* might have on the accuracy of jury verdicts, *see Crawford*, 124 S. Ct. at 1377-78 (Rehnquist, C.J., concurring), much less any evidence that *Roberts* "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach," *Summerlin*, 124 S. Ct. at 2525, *quoting Teague*, 489 U.S. at 312-13. Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly

inaccurate," *id.* at 2526, or otherwise "unfair," *id.* at 2525, *quoting DeStefano*, 392 U.S. at 634. Even assuming *Crawford's* reinterpretation of the Confrontation Clause is in some sense "fundamental" and accuracy-enhancing, it does not follow that "the values implemented by [that] right . . . would . . . measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right" as it is currently understood. *Summerlin*, 124 S. Ct. at 2525-26, *quoting DeStefano*, 392 U.S. at 634. There is simply no solid evidence that *Roberts* has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority.

Judge McKeown, however, concludes that *Crawford* is retroactive, because "the evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal." *Ante* at 2003-04. In her view, "*Crawford* itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Ante* at 2003, *quoting Summerlin*, 124 S. Ct. at 2525. But that is the wrong question. Prior to *Crawford*, courts may not have been required to exclude an unavailable witness's out-of court testimonial statement that was not was subject to cross-examination, but they were required to exclude statements that did not have "adequate indicia of reliability." *Roberts*, 448 U.S. at 66. Thus, the question is not whether testimony that has been subject to cross-examination is more likely to be reliable than testimony that has not. Rather, the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is "one without which the likelihood of an accurate conviction is *seriously*

diminished." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks omitted).

The Supreme Court's decision in *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) illustrates the principle that a new rule qualifies as a "watershed rule[] of criminal procedure," *Teague*, 489 U.S. at 311, only if it represents a substantial improvement over the previously existing rule. In *Sawyer*, the Court addressed the question whether a habeas petitioner could claim the benefit of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), which was decided after the petitioner's conviction became final and which "held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests else-where." *Sawyer*, 497 U.S. at 233. After concluding that *Caldwell* established a "new rule," *id.* at 233-41, the Court addressed whether *Caldwell* fit within either of *Teague*'s exceptions. But, in addressing whether *Caldwell* qualified as a "'watershed rule[] of criminal procedure,'" *id.* at 241, *quoting Saffle*, 494 U.S. at 495, the Court did not simply ask whether sentences imposed in violation of *Caldwell* were much less accurate than those imposed in compliance with *Caldwell*. Rather, the Court compared *Caldwell* against "the rule of [*Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974), which] was in place [at the time of the petitioner's trial and appeal] to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair." *Sawyer*, 497 U.S. at 243. Although the Court's "concern in *Caldwell* was with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence," *Caldwell* had merely been "added to an existing guarantee of due process protection against

fundamental unfairness." *Id.* at 244. Thus, the Court in *Sawyer* could not say that *Caldwell*'s "systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness,' of the type that may come within *Teague*'s second exception." *Id.*, *quoting Teague*, 489 U.S. at 314.

Here, too, *Crawford*'s new rule must be judged against the background in which it was decided, by comparing it to the rule of *Roberts*. Although certain language in Judge McKeown's opinion suggests that she purports to do so, *see Ante* at 2007 ("The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental."), she never actually asks the question upon which *Crawford*'s retroactivity turns: Does the admission of testimony which has been judicially determined to bear "adequate indicia of reliability" (as *Roberts* required), but which has not necessarily been subject to cross-examination (as *Crawford* requires), "so *seriously* diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach"? *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). As explained above, the answer to that question should not be in the affirmative.

Yet another flaw in Judge McKeown's analysis is her focus on language in *Crawford* suggesting that the new rule announced in that case is truer to the Framers' design. For example, she quotes the Court's statement that "the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford*, 124 S. Ct. at 1373. *See Ante* at 2003. "The question here is not, however, whether the Framers believed that [cross-examination provides a] more accurate [means of testing the reliability of

testimony] than [judicial determinations of 'reliability' pursuant to *Roberts*]," but "whether [the *Roberts* test] so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction.

The focus of Justice Scalia's analysis in *Crawford* was on *Roberts*' fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the *Roberts* regime. *See, e.g.*, *Crawford*, 124 S. Ct. at 1359 ("Petitioner argues that [the *Roberts*] test strays from the original meaning of the Confrontation Clause and urges us to reconsider it."); *id.* at 1369 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."); *id.* at 1370 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"). True, the Court stated that "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370; that "the legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception," *id.* at 1371; and even that "reliability is an amorphous, if not entirely subjective, concept." *Id.* But, even if one assumes that the Framers were correct as an empirical matter that cross-examination is the best way to ensure the reliability of testimony, that does not mean that any other method impermissibly threatens punishing the innocent.

Finally, Judge McKeown's analysis is contrary to that of three other circuits that have held that *Crawford*'s rule does not fit within either of *Teague*'s exceptions. *See Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004). Although Judge McKeown criticizes *Brown* on the ground that "the Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure," *see Ante* at 2009, that attack is not well-founded. Our own decision in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) does not apply retroactively, employed the very reasoning that Judge McKeown finds objectionable. *See Sanchez-Cervantes*, 282 F.3d at 670 ("By applying harmless error analysis or plain error review to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule that 'implicate[s] the fundamental fairness of the trial'" (quoting *Teague*, 489 U.S. at 312) (footnote omitted)). The Tenth Circuit's reasoning in *Brown* is entirely consistent with our own in *Sanchez-Cervantes*, and provides yet another reason why Judge McKeown's analysis is unpersuasive.

For the foregoing reasons, I conclude that *Crawford* does not qualify as a "watershed rule[] of criminal procedure" appropriate for retroactive application to convictions already final on direct review. *Teague*, 489 U.S. at 311. Like the Second Circuit in *Mungo*, *see* 393 F.3d at 334-35, and unlike Judge McKeown, *see* Ante at 2010-11, I therefore would not reach the question whether AEDPA "nullifies" the *Teague* exceptions, such that no "new rule"--even one fitting within

one of those exceptions--may serve as the basis for habeas relief.

Nonetheless, to determine whether I can concur in the result, I must evaluate Bockting's Confrontation Clause claim according to the standards articulated in *Roberts* and our own pre-*Crawford* decisions.

B.

Because Judge McKeown's opinion does not get to the application of pre-*Crawford* law to Bockting's Confrontation Clause claim, it was not necessary for her to go into detail regarding the facts of this case that are relevant to such analysis, therefore I add them here.

At Bockting's March 30, 1988, preliminary hearing, Laura described Autumn's abuse allegations and other events leading up to Bockting's arrest. Prosecutors then called Autumn to the stand. Autumn testified that she knew the difference between the truth and a lie and answered preliminary questions about the alleged assault and subsequent rape examination. As the prosecutor probed more deeply into the details of Bockting's alleged assault, Autumn began to cry and averred that she could not remember basic facts such as what occurred in the bathroom with her father and whether she discussed her father's alleged assault with Detective Zinovitch. The judge asked Laura to take a seat next to Autumn on the witness stand, and Laura encouraged Autumn to "be honest" and "tell the truth." Responding that "you already told them," Autumn refused to answer any further questions. The judge declared Autumn unavailable as a witness.

Bockting's jury trial commenced on August 15, 1988. The government, represented by Deputy District Attorney John Lukens, called Autumn as its first witness. The trial transcript reads as follows:

> The Court: Very good then. Mr. Lukens, your first witness.
>
> Mr. Lukens: Autumn Bockting.
>
> ***
>
> The Court: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State[;] the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.
>
> All right. Go ahead, counsel.
>
> Mr. Lukens: Autumn, this is when you have to stand up to be sworn.
>
> The Court: Can you stand up, Autumn? Can you stand up and raise your hand for me? Autumn, stand up now and raise your hand for us, okay.
>
> Mr. Lukens: Your Honor, I think under these conditions. I think that the witness is unable to testify. The Court: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

Mr. Lukens: Your Honor, at this time since the Court has observed for itself the inability of Autumn Bockting to testify due to the emotional conflict that goes on within her, the State intends pursuant to [Nevada Revised Statute] 51.385 to offer into evidence the statements made by Autumn Bockting to both her mother, Laura, and Detective Zinovitch and, to a more limited extent, Diane Donovan.

This offer is made pursuant to [Nevada Revised Statute] 51.385 which states in pertinent part that, "In addition to any other provision for admissibility, a statement made by a child under the age of 10 years, describing any act of sexual conduct performed with or on the child, is admissible in a criminal proceeding regarding that sexual conduct if, A, the Court finds in hearing outside the presence of the jury that the time, content and circumstances of the statement provides sufficient circumstantial guarantees of trustworthiness, and, B, the child testifies at the proceeding or is unavailable or unable to testify." I submit that portion B has been met.

And, in addition, under [the provision formerly designated] Subsection [2], it says, "If the child is unavailable or unable to testify, written notice must be given to the defendant 10 days before the trial if the prosecution intends to offer the statements in evidence."

> I would submit that the State has complied with that and that such notice was filed on August 2nd, 1988 and is styled Notice Pursuant to [Nevada Revised Statute] 51.385 wherein I gave notice of the three individuals who I intend to call as to Autumn's statements.
>
> The Court: Very well. . . .

After hearing testimony from Laura and Detective Zinovitch outside the presence of the jury, the judge concluded that Autumn's hearsay statements were admissible under Nevada Revised Statutes 51.385 because Autumn was effectively unavailable for questioning:

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of a setting. . . . The little girl is obviously unavailable. And as far as these two statements, I am meaning the one to the mother and the one to Detective Zinovitch, I think they are allowed--they are credible enough to be allowed to be related to the jury.

Roberts outlines two preconditions for the introduction of out-of-court statements against a criminal defendant. First, the government must establish the declarant's "unavailability" to testify as a witness at trial. *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000), *citing* *Roberts*, 448 U.S. at 65-66. Second, the government must demonstrate that the hearsay

statements bear "adequate indicia of reliability" by showing that they either fall "within a firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 65-66. In Bockting's state proceedings, the Nevada Supreme Court determined that the government satisfied these two requirements, *see Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1366-70 (Nev. 1993) (per curiam), and Bockting challenges these determinations on federal habeas review. Mindful of a federal court's duty to defer to the state supreme court's factual determinations and reasonable applications of Supreme Court precedent, 28 U.S.C. § 2254(d)(1)-(2), I consider each *Roberts* requirement in turn.

1.

Bockting first asserts that the Nevada Supreme Court's decision is not entitled to deference under AEDPA because the court failed to review whether Autumn was available to testify at trial. The record does not support this characterization of the state supreme court's findings. When Autumn refused to cooperate as a trial witness, the prosecution moved to introduce her hearsay statements through the testimony of her mother, Detective Zinovitch, and Doctor Donovan pursuant to Nevada Revised Statute 51.385, which provides for the introduction of a child's hearsay statements if they are "unavailable or unable to testify." NEV. REV. STAT. 51.385. Before granting the prosecution's motion, the trial court made a clear, particularized finding that Autumn's refusal to cooperate on the stand had rendered her "obviously unavailable." The Nevada Supreme Court, while observing that Nevada Revised Statute 51.385 "does not require the unavailability of a hearsay declarant as a prerequisite to the admissibility of the declarant's statements," nonetheless explicitly affirmed the trial court's determination

"that the child was unavailable as a witness." *Bockting*, 847 P.2d at 1366 n.4; *see also* NEV. REV. STAT. 51.385 (allowing the introduction of hearsay statements when "the child testifies at the proceeding" in addition to when the child "is unavailable or unable to testify"). I would therefore reject Bockting's argument that the state supreme court's unavailability determination is not entitled to deference because the trial court failed to ascertain whether Autumn was available to testify at trial.

A more difficult question is whether the Nevada Supreme Court's substantive unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In past decisions, the Supreme Court has not found it necessary to decide whether a child witness is "unavailable" for Confrontation Clause purposes when the child is merely emotionally or developmentally incapable of testifying in that forum. *See Idaho v. Wright*, 497 U.S. 805, 815-16, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). As a general matter, however, the Court held in *Roberts* that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a *good-faith effort* to obtain [her] presence at trial." *Roberts*, 448 U.S. at 75, *quoting Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (emphasis added).

Seizing on *Roberts*'s good faith requirement, Bockting makes a plausible argument that child witnesses who refuse to testify in a courtroom setting should not be considered "unavailable" unless the government first makes a good-faith attempt to secure their testimony through closed circuit television or some other medium amenable to cross-examination. I need not consider the merits of Bockting's

proposal, however, because my task here is not to decide what might be best; instead, my review is limited to whether the Nevada Supreme Court's application of *Roberts* was *unreasonable*. *See* 28 U.S.C. § 2254(d). On its face, *Roberts* requires no more than "a good-faith effort to obtain [a witness's] presence at trial," *Roberts*, 448 U.S. at 75 (emphasis removed), *quoting Barber*, 390 U.S. at 724-25, and the government arguably satisfied this requirement here by (1) securing Autumn's physical "presence" at trial and (2) making "a good-faith effort" to elicit her testimony in that forum.

The Supreme Court's more recent decisions dealing with alternative procedures for obtaining trial testimony do not materially advance Bockting's habeas petition. Although the Supreme Court has permitted states to substitute one-way closed circuit television for in-court child testimony under certain circumstances, *see Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), it has never intimated that the Constitution *requires* the government to attempt such alternative procedures as a precondition for an unavailability finding. *Cf. Wright*, 497 U.S. at 818 ("Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial."). To the contrary, the Court has emphatically rejected the assertion that *Craig*, 497 U.S. at 855, and *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), require the government to demonstrate "necessity" before introducing pretrial hearsay statements. *See White v. Illinois*, 502 U.S. 346, 358, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) ("There is . . . no basis for importing the 'necessity requirement' announced in [*Craig* and *Coy*] into the much different context of out-of-court declarations . . . ."). I would

hold, therefore, that the Nevada Supreme Court's failure to insist upon alternative procedures for procuring Autumn's contemporaneous testimony did not involve an unreasonable application of *Roberts*, *Craig*, or *Coy*.

Setting aside Bockting's assertions of legal error, I must decide whether the Nevada Supreme Court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (holding that subsection 2254(d)(2) "applies . . . to situations where petitioner challenges the state court's findings based entirely on the state record"). Under this deferential standard of review, I may not "determine that the state-court factfinding process is defective in some way" unless I am "satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor*, 366 F.3d at 1000.

The record does not support Bockting's claim that the Nevada Supreme Court's reliance on the trial court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Gill v. Ayers*, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (explaining that when a state supreme court summarily adopts a lower court's finding of fact "we look through the unexplained . . . decision to the last reasoned decision . . . as the basis for the state court's judgment" (internal quotation marks, brackets, and citation omitted)). At Bockting's preliminary hearing, Autumn initially responded to the prosecution's inquiries with incomplete or evasive answers, then quickly broke into tears and refused to answer any further questions. Efforts to elicit her testimony at trial were

even less fruitful, as she refused so much as to stand or to raise her hand to be sworn in as a witness. The trial transcript does not paint a detailed portrait of Autumn's demeanor on the latter occasion, but there are strong hints that Autumn was distraught and uncommunicative from the start, leading the state trial court to conclude that there was no use pursuing further questioning before the jury. I therefore am not "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude" that Autumn was emotionally incapable of testifying at trial. *Taylor*, 366 F.3d at 1000. To the contrary, deference to state courts is particularly appropriate in a case such as this, where findings of fact turn on a trial court's eye-witness evaluation of a child witness's demeanor. *Cf. Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) ("Determinations of demeanor . . . . [are] entitled to deference even on direct review; 'the respect paid such findings in a habeas proceeding should be no less.'" (quoting *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984))). As Bockting did not present any evidence in federal district court to challenge the state trial court's findings, I presume that the trial court's findings are correct. *See* 28 U.S.C. § 2254(e)(1); *Taylor*, 366 F.3d at 1000 ("Once the state court's fact-finding satisfies this intrinsic review [on the record,] . . . the state court's findings are dressed in a presumption of correctness . . . .").

In sum, Bockting has not established that the Nevada Supreme Court's unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

2.

Turning to *Roberts*'s "adequate indicia of reliability" requirement, the Nevada Supreme Court acknowledged that Autumn's hearsay statements did not fit within any "firmly rooted hearsay exception" but held that her statements bore the requisite "particularized guarantees of trustworthiness" for admission under *Roberts*. *Bockting*, 847 P.2d at 1367-70. Applying the multifactor test outlined in *Wright*, 497 U.S. at 821-22, the court identified several circumstances which, in its view, buttressed the "trustworthiness" of Autumn's abuse allegations, including: (1) the "spontaneity and consistent repetition" of her statements, (2) the "agitation and fear" before first recounting the experience to her mother as evinced by "the fact that she was visibly shaken and crying," (3) her apparent "knowledge of sexual conduct not present in most children six years of age," (4) her "child-like terminology" which "was reflective of candor rather than coaching," and (5) her "display of affection for Bockting . . . indicative of love rather than hate." *Bockting*, 847 P.2d at 1369.

Bockting argues that the Nevada Supreme Court evaluated the trustworthiness of Autumn's statements based on an unreasonable application of Supreme Court precedent, because it mistakenly interpreted *Wright* to prohibit consideration of any evidence that did not support trustworthiness. *Wright* held that in evaluating whether a declarant's statement bears "'particularized guarantees of trustworthiness[,]' . . . relevant circumstances include only those that surround the *making* of the statement," not evidence corroborating the *substance* of a declarant's hearsay statements (e.g., physical evidence of sexual abuse). *Wright*, 497 U.S. at 819 (emphasis added). Although *Wright* did not decide whether courts may consider noncorroborating

evidence that refutes the substance of a declarant's statements (e.g., physical evidence contradicting an accuser's abuse allegations), *see Swan v. Peterson*, 6 F.3d 1373, 1381 (9th Cir. 1993) --an issue not before us here--the Court's reasoning strongly suggests that courts must at least consider any circumstances surrounding the making of an out-of-court statement that challenge the statement's trust-worthiness (e.g., inconsistencies, motives to fabricate). *See Wright*, 497 U.S. at 825-27; *Webb v. Lewis*, 44 F.3d 1387, 1392 (9th Cir. 1994) (holding that *Wright* "does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay"); *Swan*, 6 F.3d at 1381 n.7 (reasoning in dicta that "because *Wright* holds that the consistency of a child witness's allegations bears on the reliability of an initial hearsay statement, arguably a later *inconsistent* statement should also be evaluated in making the reliability determination").

I need not decide, however, if a categorical refusal to consider evidence challenging the trustworthiness of Autumn's out-of-court statements would constitute an objectively unreasonable application of *Wright*, for the record does not support Bockting's assertion that the Nevada Supreme Court "explicitly refused to consider evidence" establishing the unreliability of Autumn's accusations in this case. Footnote 8 of the state supreme court's opinion characterizes *Wright* as excluding "corroborative evidence . . . in determining the reliability of hearsay statements" and hypothesizes that *Wright* might require courts "to exclude evidence of marital discord on the part of the parents as a possible motive in the mother for having the child fabricate charges of sexual abuse against the husband." *Bockting*, 847 P.2d at 1369 n.8. Although these statements suggest the court might have mis*interpreted Wright* to some degree, they do not clearly establish that the court mis*applied Wright* in this case

by refusing to consider critical, admissible evidence such as the marital discord between Bockting and Laura. In the body of its opinion, the court stated it reached its trustworthiness determination based on "*the totality of the circumstances* surrounding the child's out-of-court statements" and asserted that "neither the [five] factors [listed above] *nor any other aspect of the record evidence* provides insights into a motive for dissembling on the part of the child." *Id.* at 1369-70 (emphasis added). True, the court did not expressly discuss the Bocktings' marital discord and certain other evidence damaging to the trustworthiness of Autumn's statements, but it did refer to Laura's testimony that Autumn "had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults." *Id.* at 1369 n.7. Given the Nevada Supreme Court's assertion that it considered all the "record evidence" in assessing Bockting's claims, it would appear that its "totality of the circumstances" analysis did, in fact, embrace the Bocktings' marital problems and other relevant circumstances surrounding Autumn's out-of-court statements. I would thus reject Bockting's contention that the Nevada Supreme Court unreasonably applied *Wright*'s restrictions on corroborating evidence.

The ultimate determination "whether [Autumn's] hearsay statements were sufficiently reliable to be admitted without violating [*Roberts*] is a mixed question" of law and fact, *Swan*, 6 F.3d at 1379, so I review the Nevada Supreme Court's reliability determination to ascertain whether it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003) (stating that subsection 2254(d)(1) applies "to mixed questions

of law and fact" (citing *Williams v. Taylor*, 529 U.S. 362, 407-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2001)). To the extent the Nevada Supreme Court's "particularized guarantees of trustworthiness" rest on findings of fact, I must decide whether the determination "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Bockting argues that neither the spontaneity and emotional intensity of Autumn's allegations nor her apparent lack of motive to fabricate are indicative of truthfulness, because they can easily be explained away by one of two alternative theories. First, he observes that Autumn delivered her original abuse account shortly after arising from sleep and contends that she could have been recounting a fantastical nightmare. This "nightmare" theory is entirely speculative and appears implausible given the graphic specificity of Autumn's allegations. Second, Bockting posits that Laura might have fabricated the abuse allegations herself and coached Autumn through the police interviews. Like the "nightmare" theory, this "coaching" theory is utterly unsubstantiated by the record, and it fails to account for Autumn's spontaneous use of dolls to describe the assault during her interview with Zinovitch and the child-like terminology Autumn used to describe her abuse. *See Bockting*, 847 P.2d at 1368. Because Bockting's speculation and conjecture do not establish that the Nevada Supreme Court's factual findings were "unreasonable" with respect to Autumn's spontaneity, mental state, and motive, 28 U.S.C. § 2254(d)(2), I presume these findings are correct, *id.* § 2254(e)(1). *See Taylor*, 366 F.3d at 1000.

Somewhat more compelling is Bockting's challenge to the Nevada Supreme Court's reliance on Autumn's "knowledge of sexual acts that a child of six would not usually be aware

of absent personal experience." *Bockting*, 847 P.2d at 1369. Laura conceded at trial that Autumn had seen adult sexual organs, had showered with each of her parents, had watched her mother practice exotic dancing, and had observed her parents engaging in sexual intercourse after entering the bedroom unnoticed. Bockting elaborated on Laura's testimony, alleging that Autumn had witnessed her parents engage in oral sex and was herself "interested" in sex. For these reasons alone, the state supreme court had reason to suspect that Autumn's familiarity with adult sexual acts would exceed that of the average six-year-old. On the other hand, the state supreme court concluded that the testimony of Autumn's parents did not adequately account for Autumn's ability to "demonstrate[] through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child" and to describe "how she held onto the [bathroom] sink while Bockting was behind her and 'would press real hard and it hurt.'" *Id.* The substance of Autumn's allegations disclosed knowledge of sexual acts gained from direct personal experience, not remote observation. Thus, it was not unreasonable for the state supreme court to find, as it did, that Autumn's prior exposure to adult sexual acts did not adequately explain her familiarity with the specific acts described in her abuse allegations.

Arguably the weakest link in the Nevada Supreme Court's "particularized guarantees of trustworthiness" determination is its finding that "sufficient . . . consistent repetition existed in [Autumn's] various statements." *Id.* Autumn's abuse allegations to her mother and Detective Zinovitch were substantially identical, so it was not unreasonable for the state supreme court to conclude that Autumn's "restatement of her travails [to Detective Zinovitch] was consistent with the details she had previously told to her mother." *Id.* at 1368.

On the other hand, the court did not mention that Autumn's out-of-court statements contradicted her testimony at the preliminary hearing in several material respects. The Nevada Supreme Court's inattention to these inconsistencies in Autumn's statements is potentially significant under AEDPA; as the Supreme Court has observed and we have held, section 2254(d)(2) allows habeas relief "where the state has before it, yet apparently ignores, evidence that supports [a] petitioner's claim." *Taylor*, 366 F.3d at 1001 (paraphrasing *Miller-El v. Cockrell*, 537 U.S. 322, 346, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

Although the Nevada Supreme Court did not expressly discuss Autumn's statements at the preliminary hearing when evaluating the consistency of her out-of-court statements, it did not ignore these statements altogether. The court clearly recognized the inconsistencies in Autumn's statements, because the "Facts" section summarized Autumn's relevant testimony at the preliminary hearing. *See Bockting*, 847 P.2d at 1365 ("At the preliminary hearing, ... [Autumn] stated that her pants were never removed [during the alleged abuse] and that she could not remember how Bockting touched her."). Thus, this testimony was an "aspect of the record evidence" that the state supreme court incorporated into its evaluation of the "totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*." *Id.* at 1369-70. As such, I would reject Bockting's assertion that the state supreme court "failed to consider and weigh relevant evidence that was properly presented." *Taylor*, 366 F.3d at 1001.

Moreover, Autumn's testimony at the preliminary hearing does not compel the conclusion that the Nevada Supreme Court's reliability analysis runs "contrary to, or involve[s] an unreasonable application of," *Roberts* or *Wright*. 28 U.S.C.

§ 2254(d)(1). As we recently explained, "the Supreme Court has specifically 'declined to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under [*Roberts*],'" and "'courts have considerable leeway in their consideration of appropriate factors.'" *Parle v. Runnels*, 387 F.3d 1030, 1039 (9th Cir. 2004), *quoting Wright*, 497 U.S. at 822. In this case, the state supreme court had good reason to focus on the consistency of Autumn's statements to her mother and Detective Zinovitch and discount the reliability of her in-court statements as factors in its reliability analysis. Autumn's testimony at the preliminary hearing was patently evasive, perhaps reflecting her emotional state, her desire to minimize harm to her stepfather, and her embarrassment at being asked to discuss the assault's graphic details in an open public forum. Doctor Donovan's expert testimony also indicated that Autumn's equivocation at the preliminary hearing was consistent with the denial phase child abuse victims commonly endure after a sexual assault. Considering the totality of the circumstances surrounding Autumn's hearsay statements, *see id.* at 820, I am not persuaded that the Nevada Supreme Court applied *Roberts* and *Wright* unreasonably by holding that Autumn's testimony at the preliminary hearing does not singlehandedly tip the scale of reliability against the admission of her out-of-court statements.

Since the Nevada Supreme Court's "unavailability" and "adequate indicia of reliability" determinations satisfy AEDPA's stringent standard of review, Bockting's Confrontation Clause claim fails.

II.

In addition to his Confrontation Clause claim, Bockting raises several other claims in support of his habeas petition.

Although neither Judge McKeown nor Judge Noonan discuss these issues, I explain why these arguments should not require reversal.

A.

Bockting contends that the state trial court violated his right to due process by admitting witness testimony regarding a prior accusation of sexual misconduct. Bockting takes issue with the following exchange between Deputy District Attorney Lukens and Laura, which took place during the state's rebuttal to defense character evidence:

> Q: Without going into the details underlying this, I am going to ask you the following question. Between July of 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and Autumn?
>
> A: Yes.
>
> Q: What was his response at the time?
>
> A: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what she said.

Bockting did not object to these questions or request a limiting instruction, and the state trial court did not give such an instruction.

During his "post conviction relief" hearing, Bockting argued that Laura's testimony impermissibly allowed the jury to consider past allegations of sexual assault as evidence that he committed the subsequent sexual assault for which he was

convicted. The state trial court and supreme court upheld the evidence's admission, holding that the trial court's decision was consistent with state evidence law. *See* NEV. REV. STAT. 48.045(1) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [as] offered by an accused, and similar evidence offered by the prosecution to rebut such evidence . . . ."); *id.* 48.055. ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of opinion. On cross-examination, inquiry may be made into specific instances of conduct.").

I do not consider at this stage whether the Nevada Supreme Court misinterpreted Nevada law by refusing to grant post-conviction relief based on the trial court's decision to admit Laura's testimony without providing a limiting instruction sua sponte. "Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." *Whelchel v. Washington*, 232 F.3d 1197, 1211 (9th Cir. 2000) (internal quotation marks and citation omitted). Thus, my task is limited to deciding whether the evidence's admission violated Bockting's clearly established *federal* rights as defined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

The Supreme Court has never decided whether due process prohibits the admission of prior bad acts evidence, *see Estelle v. McGuire*, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (declining to decide whether due process prohibits prior bad acts evidence to show propensity to commit a crime); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003), *cert. denied*, 540 U.S. 930, 124 S. Ct. 345, 157 L. Ed. 2d 236 (2003) (mem.) ("There is no clearly

established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence."), but it has said that defendants who challenge a state court's admission of relevant evidence on due process grounds "must sustain the usual heavy burden that a due process claim entails: . . . 'it [must] offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality), *quoting Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal footnote omitted).

In this case, the admission of Laura's unobjected-to testimony did not meet this "heavy burden" for a valid due process claim. The trial court admitted Laura's testimony during the state's rebuttal case as a response to the testimony of three defense witnesses who testified concerning Bockting's alleged good reputation and character. Laura's rebuttal testimony was relevant to impeach the defense's reputation evidence. The prosecutor touched on Laura's previous allegations only briefly, deliberately skirted the allegations' underlying details to minimize prejudice, and fully disclosed Bockting's vehement denial of the allegations. Moreover, the testimony arguably advanced Bockting's defense by introducing his emotional denial of the previous allegations, as well as Laura's concession that she "didn't believe" the allegations. Given that this evidence came in response to defense character evidence and taking into account the lack of objection, the brevity, and limited scope of the government's questioning relating to Laura's previous confrontation with Bockting, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of this evidence did not transgress a "principle of justice so rooted in the traditions

and conscience of our people as to be ranked as fundamental." *Id.* (internal quotation marks omitted).

B.

Bockting asserts that the government violated his due process right to a fair trial by vouching for Laura's credibility during closing argument. *See United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) ("Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony."). As examples of vouching, Bockting cites the prosecutor's statements that Laura "testified as candidly as I think is possible" and "had one motive and it was to tell you the truth." He also faults the prosecutor for characterizing Laura's testimony as "unembellished, . . . straightforward, and . . . candid."

Even if these statements arguably constituted "vouching," Bockting does not qualify for habeas relief under AEDPA's deferential standard if the Nevada Supreme Court's failure to grant post-conviction relief on this basis was neither "contrary to," nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). According to the Supreme Court, "the relevant question" in evaluating a prosecutorial vouching claim "is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Several factors work to Bockting's disadvantage here. First, the prosecutor did not ask the jury to accept Laura's

credibility based on his endorsement alone; rather, he explained that "the *evidence* shows that [Laura] was candid" (emphasis added), and he identified several specific instances where Laura made no attempt to conceal facts damaging to Autumn's allegations (e.g., Autumn observing her parents engaged in sexual relations) or to her own reputation and credibility as a government witness (e.g., her drug and alcohol problems, her occupation as a nude dancer). *See Necoechea*, 986 F.2d at 1276 (recognizing "that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying"). Second, the trial court significantly diminished the risk of prejudice by instructing the jury that "statements, arguments and opinions of counsel are not evidence in the case." As in *Davis v. Woodford*, 333 F.3d 982 (9th Cir. 2003), "this was not a case in which there was an 'overwhelming probability that the jury [would] be unable to follow the court's instructions' and 'a strong likelihood that the effect of the [vouching] would be devastating to the defendant,'" *id.* at 997 (second alteration in original), *quoting Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). Third and perhaps most important, the prosecutor's statements did not render the trial fundamentally unfair because the record confirmed Laura's testimony, including: testimony by Doctor Rivers (who conducted Autumn's rape examination) that Autumn had suffered penetration injuries to her vagina and rectum during the previous week, Bockting's admission that he was the only adult male who was alone with Autumn during the week when she sustained her injuries, and Detective Zinovitch's testimony substantially corroborating Laura's description of Bockting's sexual assault. In sum, under the circumstances of this case, Bockting has not demonstrated that the Nevada Supreme Court applied the principle in *Darden* unreasonably by holding that the

prosecutor's vouching did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Davis*, 333 F.3d at 996-97, *quoting Darden*, 477 U.S. at 181.

C.

Lastly, I consider Bockting's assertion that his representation at trial was constitutionally deficient. The Supreme Court has held that a claimant "must show that counsel's performance was deficient" and that such "performance prejudiced the defense" to prevail on a Sixth Amendment ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a claimant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The question to be answered is whether the Nevada Supreme Court's denial of post-conviction relief was "contrary to, or involved an unreasonable application of," these principles. 28 U.S.C. § 2254(d)(1).

I confine my ineffective assistance analysis to the three issues addressed in our October 16, 2002 order granting Bockting's first motion to broaden the Certificate of Appealability (COA): (1) trial counsel's failure to object to inadmissible hearsay evidence at trial, (2) trial counsel's failure to object to repeated instances of prosecutorial vouching, and (3) appellate counsel's failure to research adequately and present these appealable issues to the Nevada Supreme Court. Bockting's second motion to broaden the COA, which is currently before this court, raises a fourth

ineffective assistance of counsel issue: his "trial counsel's failure to conduct any investigation of the facts which would undermine the reliability of the child's hearsay statements." The second motion for broader certification was filed on June 17, 2003--more than a year after the district court declined to certify Bockting's ineffective assistance of counsel claim and eight months after we granted his first motion to broaden the COA. Pursuant to Circuit Rule 22-1(d), Bockting should have raised any and all grievances relating to the COA's scope "within thirty-five days of the district court's entry of its order denying[, in part, his] certificate of appealability." 9TH CIR. R. 22-1(d). His "failure to comply with the Circuit Rule's procedure is a ground for denying" the second motion, "which [I would] do here." *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003).

With respect to the remaining Sixth Amendment claims, the Nevada Supreme Court invoked *Strickland*'s standard and held that Bockting "has not demonstrated that counsel's performance was unreasonable, or that counsel's errors were so severe that they rendered the jury's verdict unreliable." I need not consider the first part of this holding, because the record as a whole does not support Bockting's claim that the state supreme court unreasonably applied *Strickland*'s prejudice inquiry. *Cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1053 (9th Cir. 2004) (observing that "in making a harmless error determination in a habeas case," federal courts have "an obligation" to consult the full record), *quoting O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).

Bockting faults his trial counsel for failing to object to the government's prior bad acts evidence, but he has not demonstrated that he suffered any prejudice from his counsel's allegedly deficient performance. A timely objection

by Bockting's counsel likely would have been futile, because Laura's testimony was admissible under state law. In addition, even setting aside Laura's testimony concerning Bockting's prior bad acts evidence, the evidence against Bockting was overwhelming. Similar logic dooms Bockting's other arguments. His trial counsel's failure to register a timely objection to the prosecutorial vouching did not clearly prejudice his defense, because the trial court gave a cautionary instruction and there was overwhelming evidence corroborating Laura's testimony.

In sum, Bockting has not shown that the Nevada Supreme Court applied *Strickland* unreasonably to the facts of this case by holding that his "counsel's errors were [not] so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. I would therefore hold that we lack authority under AEDPA to grant Bockting's petition for habeas relief on this ineffective assistance of counsel claim.

For the foregoing reasons, I would affirm the district court's denial of Bockting's petition for habeas corpus. I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed March 2, 2005]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER, et al.	)
Respondents-Appellees.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Omitted in this Appendix]

I. ISSUES PRESENTED

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2. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN THAT THE DECISION CREATED A DIRECT CONFLICT WITH THE PUBLISHED DECISIONS IN THE SECOND, EIGHTH, AND TENTH CIRCUITS.

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COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

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5. THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES, TO WIT: *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.CT. 1710, 123 L.ED. 2D 353 (1993), IN THAT THE PANEL FAILED TO APPLY THE CORRECT STANDARD FOR HARMLESS ERROR, AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

II. BACKGROUND

This matter is an appeal of a decision of the district court denying a habeas corpus petition by a State inmate under 28 U.S.C. § 2254. On February 22, 2005, the panel entered a

published decision finding that the matter of certain hearsay testimony introduced at trial in 1988 was governed by the new Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). The panel applied the *Crawford* decision *retroactively* to Bockting's case long after the conviction had become final and when it was on collateral review, under the second exception to the non-retroactivity rule set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989).

The decision is characterized by the panel members as a 2-to-1 decision in favor of granting the writ. This characterization is erroneous, because of the specific nature of the opinions. The decision is complicated by its fragmented nature, as it actually contains three conflicting opinions, none of which agree on the totality of the necessary elements of the disposition itself, and by the fact that the judges disagree about the nature of the "majority" opinion, and its precedential value. The decision is, in effect, a 1-1-1 split of the three judges. One judge, Judge McKeown, opined that the rule of *Crawford* was a new procedural rule and that it was applicable retroactively to cases on collateral review; another judge, Judge Wallace, opined that the *Crawford* rule was a new procedural rule which was <u>not</u> applicable retroactively to cases on collateral review; the remaining judge, Judge Noonan, held that the rule in *Crawford* was not a new rule, but only a "correction of a misrepresentation", and that retroactivity was not a relevant issue.

III. ARGUMENT

A. THE CONFLICTING OPINIONS OF THE PANEL MEMBERS DID NOT RESULT IN A PRECEDENTIAL DECISION BECAUSE THE PANEL ENTERED THREE CONFLICTING OPINIONS AND FAILED TO COME TO ANY CONSENSUS OF AT LEAST TWO JUDGES ON THE CORE QUESTION OF *TEAGUE*, AND THE DECISION ERRS IN CHARACTERIZING ITSELF AS A 2-TO-1 DECISION GRANTING THE WRIT UPON *CRAWFORD*.

The primary opinion by Judge McKeown states on page 2001 that she and Judge Noonan both found ways to apply *Crawford* to Bockting's case, she by finding it a new rule that was retroactive, and he by finding it a rule that was not new. Her opinion thereby states that two judges held for Bockting in a 2-1 decision. This conclusion is erroneous. Despite the appellation of his opinion as a "concurring" opinion, Judge Noonan in fact *dissented* from Judge McKeown's opinion. His opinion contains two parts, his dissenting opinion that is three pages long, and a second opinion, just one sentence long, wholly inconsistent with the first, and in effect, recanting that first opinion. Judge Noonan's opinion wholly disagrees with that of Judge McKeown as to *both* rationale *and* result, and cannot, therefore, constitute a concurring opinion. Because Judge Noonan explicitly rejected Judge McKeown's rationale *and* result, his opinion is, in actuality, a *dissenting* opinion. Thereafter, his second opinion wholly repudiates his first opinion in irreconcilable terms. He attempts to do two conflicting things simultaneously–he wholly rejects, and yet wholly accepts, Judge McKeown's argument. It is not possible to discern what Judge Noonan's position is, as his two opinions negate each other on the same

issue, and this internally inconsistent position is a logical impossibility, creating an irreconcilable conflict. Moreover, it appears that Judge McKeown's opinion rejects Judge Noonan's attempt to negate his own opinion and to join hers, when she states just the *opposite,* that Judge Noonan gets to *Crawford* a *different* way from hers, by *rejecting* the applicability of *Teague*. *Bockting*, at 2001. According to the opinions themselves, then, there is no consensus as to how the "majority" opinion was formed. According to the opinions, there is none.

Black's Law Dictionary defines "to concur" and "concurring opinion" as an opinion filed by an appellate judge or justice in which (s)he agrees with the ultimate conclusion or result of another opinion filed in the case, while disagreeing with, and offering a separate rationale for reaching, that decision. Such separate opinions, of course, are common. Here, Judge Noonan did not file a concurring opinion, but rather two internally inconsistent opinions—one longer *dissenting* opinion, and a subsequent one-sentence opinion purportedly *joining* Judge McKeown's opinion, which was never recognized by her.

This inconsistency creates two foundational problems. First, opinions which are internally inconsistent are routinely criticized and rejected by courts, and further serve as grounds for reconsideration and reversal. See, *Darien Capital Management, Inc. v. Commonwealth of Pennsylvania*, 549 Pa. 1, 8, fn. 7, 700 A.2d 395 (1997) (reversal of trial court for inconsistencies in ruling); *State of Wisconsin v. Sullivan*, 184 Wis. 2d 668, 680, fn. 11, 517 N.W. 2d 449 (1994) (reversing court of appeals for inconsistencies in published opinion); *Green v. French*, 143 F.3d 865 (4th Cir. 1998) (appellate court criticizing sister appellate court for confusion and internal inconsistency in published opinion). Members of

this court, too, have filed vociferous dissenting opinions criticizing the internal inconsistency of majority opinions. See, *United States v. Koon*, 45 F.3d 1303 (9th Cir. 1995). Here, of course, the inconsistency of Judge Noonan's "concurring opinion" is clear and fundamental–he both disagrees with, and agrees with, simultaneously, the primary opinion. He apparently concludes that Judge McKeown is both completely wrong and completely right, and he purports to posit, simultaneously, that the *Crawford* decision is both not "new" under *Teague* and, at the same time, wholly new. This position is impossibly inconsistent.

Second, Judge McKeown errs in a similar fashion by concluding that her opinion and Judge Noonan's longer opinion together constitute a majority opinion holding that *Crawford* applies to Bockting's case (even if under different theories). Her statement on page 2001 that she and Judge Noonan both found ways, albeit different ones, to apply *Crawford*, and to form a majority opinion for Bockting, is itself not correct. The necessary threshold issue under *Teague* is whether the *Crawford* rule is a new rule. Judge McKeown and Judge Wallace both held that the Crawford rule was a "new rule" under *Teague*. That is the majority ruling on that threshold issue. Judge Noonan's opinion regarding *Crawford*'s non-newness is merely a dissenting opinion standing in opposition to the two judge majority that ruled that *Crawford* was a new rule. Judge Noonan was overruled on this issue, so he cannot reach it, with or without another judge's opinion. Even Judge Noonan recognizes this fact– this was the precise basis for his second opinion which renounced and disavowed his first. Again, there is no consensus as to how the "majority" opinion was formed, and the statements within the opinions on this subject are not supported by the opinions themselves.

B. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN THAT THE DECISION CREATED A DIRECT CONFLICT WITH THE PUBLISHED DECISIONS IN THE SECOND, EIGHTH, AND TENTH CIRCUITS.

If there is a majority opinion holding that *Crawford* is a new rule retroactively applicable to cases on collateral review, it creates, for the first time, a conflict among the circuits. The Second, Eighth, and Tenth Circuits have issued published opinions holding that *Crawford* cannot be retroactively applied. *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004); *Evans v, Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004). All of these decisions were *unanimous* dispositions against the retroactive application of *Crawford*.

C. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THIS COURT, TO WIT: *HIRACHETA V. ATTORNEY GENERAL*, NO. 03-16295 (2004), AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

The panel's decision entered February 22, 2005 conflicts with a decision of this court, to wit: *Hiracheta v. Attorney General*, No. 03-16295 (2004), (see, Circuit Rule 36-3 (b)(iii)), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. This court has held that rehearing is proper to resolve conflict among decisions in the Circuit's own case decisions:

> In his suggestion for rehearing en banc, Hardesty asserted that under the law of this circuit, the irreconcilable conflict between *Thornton* [*United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983)] and *Terrovona* [*United States v. Terrovona*, 785 F.2d 767 (9th Cir. 1986)] must be resolved by an en banc court. In *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc), cert. denied, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed. 2d 503 (1988), we held that 'the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision.' Id. at 1478-79. Unless an alternative method is provided by rule of this court, '[a] panel faced with such a conflict *must* call for en banc review, which the court will

> normally grant unless the prior decisions can be distinguished.'

United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992). *See, also*, Circuit Rule 36-3 (b)(iii). Because the court has already ruled that *Crawford* can have only prospective application, an irreconcilable conflict exists between that decision and this matter. The *Hiracheta* decision was unanimous against retroactivity, and cited *Luebbers*, supra, for its support.

D. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY, IT CONFLICTS WITH A NUMBER OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, INCLUDING *TEAGUE V. LANE*, 489 U.S. 288, 109 S.CT. 1060, 103 L.ED. 2D 334 (1989), AND ITS PROGENY, AND 28 U.S.C. § 2254(D)(1), AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

Crawford constitutes a new procedural rule under *Teague* that is not applicable retroactively, since it does not constitute a "watershed rule" under the second *Teague* exception.

In 1993, after remand from the United States Supreme Court, the Nevada Supreme Court applied the correct law to Bockting's appeal in an objectively reasonable manner under *Idaho v. Wright*, 497 U.S. 805 (1990), as the Court was specifically instructed to do. *Crawford* represents a new and

different rule with different elements from the law existing in 1993. The change was not foreseeable.

The Supreme Court held in *Teague* that a "new rule" was one which "breaks new ground or imposes a new obligation on the states or the federal government." *Teague*, 489 U.S. at 301. "A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* When a decision of the United States Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Schriro v. Summerlin*, __ U.S. __, 124 S.Ct. 2519, 2522 (2004), citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708 (1987). " As to convictions that are already final, however, the rule applies only in limited circumstances." *Id.*, at 2522. New substantive rules generally apply retroactively, while new rules of procedure generally do not apply retroactively. Clearly, *Crawford* does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe", *Teague*, 489 U.S. at 307, and at 311, and does not create a new "'substantive categorical guarantee[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle*, supra, 494 U.S. at 494, quoting *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). *Crawford* is procedural.

New rules of procedure generally do not apply retroactively. New procedural rules do not produce a class of persons convicted of conduct the law does not make criminal, but merely "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, supra, 124 S.Ct. at 2523. Because of the more "speculative connection to innocence," *Id.*, the Supreme Court gives retroactive effect to only a small set of

"'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, quoting *Saffle*, supra, at 495, quoting in turn, *Teague*, supra, 489 U.S. at 311. This category of new rules is exceedingly small.

It is not quite accurate to say, however, that new rules of procedure generally do not apply retroactively. In fact, it is quite a bit more accurate to say that new rules of procedure *almost never* apply retroactively:

> That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conv ction is seriously diminished'...This class of rules is extremely narrow, and '***it is unlikely that any...has yet to emerge.***' *Tyler v. Cain,* 533 U.S. 656, 667, n.7, 121 S.Ct. 2478, 150 L.Ed. 2d 632 (2001) (quoting *Sawyer v. Smith,* 497 U.S. 227, 243, 110 S.Ct. 2822, 111 L.Ed. 2d 193 (1990).

Schriro, 124 S.Ct. at 2523 (emphasis added).

It is instructive to the issue at hand that this statement by the Supreme Court was included in the *Schriro* decision, handed down only three and a half months *after the Crawford* decision issued. In it, the Supreme Court announced that it was a virtual conclusion that no new procedural rules of the magnitude sufficient to qualify as exceptions to the non-retroactivity rule had yet been created–even *after* issuance of the *Crawford* decision. The panel's decision did not appear to recognize the importance of the Supreme Court's conclusion. The set of non-qualifying new rules clearly included the *Crawford* rule.

In spite of the recognition that the second *Teague* exception is "extremely narrow", *Bockting*, at 2002, Judge McKeown still applied *Crawford* retroactively; her error in doing so the second *Teague* exception is McKeown still applied is three fold-first she artificially created a forced-choice dichotomy between watershed rules that can be retroactively applied, and what she calls new rules that "mere[ly] tweak" existing rules; *Bockting*, at 2009. She further states that *Schriro* offers "no guidance" to the question of retroactivity. *Id.* at 2022. The Appellees respectfully disagree.

This artificial distinction fails to reflect the fact that a new rule can be important, often *very* important, and still not be a watershed rule. Many very important new rules have been held to be non-retroactive; only *one* new rule, the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), has been held to be retroactive. The judge's standard, implying that any important rule should be retroactive to cases on collateral review, simply disregards the Supreme Court's directives. Her second error lies in her apparent confusion between a new rule that is based on an important right, and that *right itself*. New rules, and the underlying rights upon which they are based, are not coextensive. As the Tenth Circuit said in *Uphoff* in rejecting retroactivity for *Crawford*;

> It is true that in *Crawford* the Court referred to the protections of the Confrontation Clause as a 'bedrock procedural guarantee,' *Crawford*, 541 U.S. at ___, 124 S.Ct. at 1359, but that comment does not necessarily suggest that the rule set forth in Crawford is 'on the magnitude of the rule announced in *Gideon v. Wainwright*' as it must be to fit within the *Teague* exception...Unlike *Gideon*, *Crawford* does not 'alter [] our understanding of what constitutes basic due

> process,' but merely sets out new standards for the admission of certain kinds of hearsay.

Uphoff, supra at 1226.

The *Crawford* decision certainly did not create the right of cross examination, and it is not even remotely analogous to the rule in *Gideon v. Wainwright*, which did create a new right–the right to counsel in State court prosecutions. The right to confront was, furthermore, understood in the former rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), and served as the basis of that rule. It was the right to confront upon which *Roberts* was based; *Crawford* merely *reflects* that right and creates a new mechanism for its application. Confusing this distinction between a new rule and its already-existing foundational right dilutes the extreme narrowness of the class of new rules that fall into the second *Teague* exception. Moreover, the notion that the *Schriro* decision "alters our understandings of bedrock procedural principles", *Bockting*, at 2003, finds no support in that decision, in light of the statement in that decision, cited supra, that "This class of rules is extremely narrow, and 'it is unlikely that any...has yet to emerge", made *after* the disposition of *Crawford*, and presumably inclusive of it.

Third, the primary opinion misreads the Supreme Court's second factor in its standard for bedrock rules–it is not that a bedrock rule is one which "seriously decreases the possibility of inaccurate conviction". According to the Supreme Court, "That a new procedural rule is 'fundamental' in some abstract sense is not enough;" the question is whether the former rule affects accuracy in such a manner to so seriously diminish accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. *Schriro*, supra, 124 S.Ct. at 2525, citing *Teague*, at 312-313, quoting *Desist v. United*

States, 394 U.S. 244, 262, 89 S.Ct. 1030, 22 L.Ed. 2d 248 (1969). This standard is considerably higher than that applied by the primary opinion.

The new rule in *Crawford* is not on par with the rule announced in *Gideon v. Wainwright*. The new Crawford rule is more analogous to rules not found to be retroactive, such as the rule announced in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), requiring jury determination of sentences in capital cases, held in *Schriro* not to be retroactive, the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), establishing a mechanism to protect against racially-motivated peremptory challenges, held in *Teague* not to be retroactive, and the rule in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), the fundamental right to trial by jury extended to the States, held in *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) not to be retroactive.[1] To paraphrase Judge McKeown from page 2009 of *Bockting*, there is nothing "mere" about any of these new rules either, and they are much more than mere tweaks of earlier rules, yet *none* of them was given retroactive application by the Supreme Court. The primary opinion simply applies an artificially low standard.

Finally, the primary opinion falls into the same quicksand that the Supreme Court warned of in *Schriro*–the uncritical assumption that the new rule will provide substantially more accuracy than the former. In *Schriro*, the Supreme Court

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[1] It is further noteworthy that the foundational decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) concerning the exclusionary rule was held not to be retroactive in *Linkletter v. Walker*, 381 U.S. 618 (1965).

rejected this argument by pointing out that "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro*, at 2525. While Judge McKeown assumes that it is unequivocal that the *Crawford* rule increases accuracy so far as to qualify for retroactive application, her assumptions of unequivocation are too presumptive. In *Mungo v. Duncan*, supra, the Second Circuit held that one reason the *Crawford* decision was not retroactive was because it is *not* assured that the new rule will increase accuracy. In words that echo the Supreme Court's similar warning in Schriro, the Second Circuit said:

> We do not believe that *Crawford* necessarily improves the overall accuracy of the criminal process. As we see the operation of the Crawford rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy... At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries...it does not necessarily follow that the *Crawford* rule will improve the accuracy of the process.

Mungo, supra, at 335-36. Under *Crawford*, much hearsay is still admissible; much of that admissible hearsay will not necessarily be accurate or reliable.

Crawford did not announce a watershed rule.

E. THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES, TO WIT: *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.CT. 1710, 123 L.ED. 2D 353 (1993), IN THAT THE PANEL FAILED TO APPLY THE CORRECT STANDARD FOR HARMLESS ERROR, AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

The primary opinion conducted a harmless error review of the police officer's hearsay-based testimony. The opinion, citing *Neder v. United States*, 527 U.S. 1 (1999) applied the *Chapman* beyond-a-reasonable-doubt harmless error standard, which is cited at length therein. The primary opinion at 2012 states it is applying that standard. The court applied the wrong harmless error standard.

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993), the Supreme Court decided that, upon habeas corpus review, the more deferential *Kotteakos* standard applied, rather than the *Chapman* standard. This court's conclusion demonstrates the application of the erroneous standard: "Even if her [the child rape victim's] statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict...." At 2012. The correct standard under *Brecht* requires a reviewing court to ask whether the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, supra, at 631. Here, the application, of the correct standard makes a significant difference because the court failed to analyze the importance

of the testimony of the child's mother regarding the child's sudden report of the sexual assaults and rapes by Bockting, hearsay testimony which is non-testimonial under *Crawford*, ***and which testimony was fully supported and corroborated by the scientific evidence of the medical examination performed on the child***. Under a complete analysis performed under the correct standard, the court would have necessarily come to the conclusion that the error, even assuming arguendo that *Crawford* could be applied retroactively under *Teague* and 28 U.S.C. § 2254 (d)(l), was harmless because other significant and admissible evidence was presented sufficient to convict Bockting.

IV. CONCLUSION

The Nevada Supreme Court correctly applied Supreme Court law in 1993, under 28 U.S.C. § 2254(d). For the reasons set forth above, the decision in Bockting's case should be withdrawn and the decision of the district court should be affirmed.

DATED this 2d day of March, 2005.

BRIAN SANDOVAL
Attorney General

By: /s/
VICTOR-HUGO SCHULZE, II
Deputy Attorney General
Special Prosecutions/Habeas
Corpus Unit-South

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 13, 2005]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER,	)
Respondent-Appellee.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLANT'S OPPOSITION TO APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

[Table of Contents and Table of Authorities
Omitted in this Appendix]

I.

WHEN A JUDGE OF THIS CIRCUIT OFFERS AN ALTERNATIVE RATIONALE FOR A RESULT AND SPECIFICALLY CONCURS WITH BOTH THE RATIONALE AND THE RESULT REACHED BY A SECOND MEMBER OF THE PANEL, A 2-1 DECISION RESULTS

Two members of the panel in this case determined that the decision in *Crawford, v. Washington*, 541 U.S. 36 (2004) should be applied retroactively to cases on collateral review. Judge McKeown held that the rule set forth in *Crawford* is new but that it should be applied retroactively because it was both a "watershed rule" and one without which the likelihood of an accurate conviction was seriously diminished. Judge Noonan offered an analysis that the rule in *Crawford* was a "bedrock procedural guarantee" that was not a new rule and that therefore the rule would apply to Bockting's case. However, Judge Noonan characterized his position as follows: "As an alternative to the foregoing analysis and in order to provide a precedent for this court, I also concur in Judge McKeown's **analysis and opinion**." [emphasis added]. Opinion at page 1024.

Respondent argues that "Judge Noonan's opinion wholly disagrees with that of Judge McKeown as to *both* rationale *and* result, and cannot, therefore, constitute a concurring opinion." Petition for Rehearing at p. 4. The State argues that Judge Noonan actually dissents from Judge McKeown's opinion and that therefore, there is no concurrence and no majority opinion.

While Judge Noonan offered an alternative reason why the result set forth in Judge McKeown's opinion is the right one, there is no question that Judge Noonan concurred with both the rationale and the result set forth in Judge McKeown's opinion.

The rule articulated by the U.S. Supreme Court in assessing the precedential value of plurality opinions is, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds..." *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976). This rule need not be reached in this instance, however, because Judge Noonan expressly concurred in Judge McKeown's "analysis and opinion."

II.

REHEARING EN BANC IS NOT REQUIRED WHEN A PUBLISHED OPINION CONFLICTS WITH AN UNPUBLISHED DECISION

The State suggests that *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) requires en banc consideration because an unpublished disposition of this court, *Hiracheta v. Attorney General*, No. 03-16295 is in conflict with the result reached in this case. In *Hardesty*, the conflict was created by two published decisions. Here, the only Ninth Circuit opinion which has precedential value is the opinion in this case. There is no requirement for en banc consideration because there is no conflict in the precedent of this court.

III.

EN BANC CONSIDERATION IS NOT REQUIRED BECAUSE THE OPINION IN THIS CASE IS SOUNDLY BASED IN THE PRINCIPLES SET FORTH IN *SCHRIRO V. SUMMERLIN*

A. The *Summerlin* Decision

Under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule of criminal procedure generally does not apply retroactively. However, retroactive effect may be given to a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, --- U.S.---, 124 S.Ct. 2519, 2523 (2004)(quoting *Teague*, 489 U.S. at 311). This Court has stated that retroactive application is available when the rule improves the accuracy of the trial and changes "our understanding of the 'bedrock procedural elements essential to the fairness of a proceeding. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668-69 (9th Cir. 2002) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

In arriving at its decision in *Bockting*, the majority found that, unlike the rule of *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that aggravating factors in a death penalty case must be proved to a jury rather than to a judge), which was not given retroactive effect in *Summerlin*, 124 S.Ct. at 2525 (*Ring* not retroactive because the evidence was "simply too equivocal to support [the] conclusion" that judicial factfinding seriously diminished the accuracy of convictions), the rule of *Crawford* deserved retroactive effect because "the evidence that cross-examination seriously decreases the possibility of inaccurate conviction [was] unequivocal." *Bockting*, 399 F.3d at 1017. Thus, in arriving at its decision, the panel

viewed Crawford in light of *Summerlin* and correctly focused on the differences between the rights at issue in those cases and their respective impact on the accuracy of criminal convictions.

Viewing *Crawford* and *Summerlin* together was especially important because the majority opinions in both cases were authored by Justice Scalia within months of each other. The kind of rule that the *Summerlin* court would find to fit that narrow class of rules "without which the likelihood of an accurate conviction is seriously diminished" is precisely the kind of rule described in such detail in the *Crawford* opinion itself. As the *Bockting* opinion correctly noted, "[j]uxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the proceeding." *Bockting*, 399 F.3d at 1017. To further emphasize this point, it will be helpful to briefly review *Summerlin*.

In *Summerlin*, Justice Scalia, writing for the majority, held that *Ring v. Arizona*[1] did not apply retroactively to cases already final on direct review because it did not announce a watershed rule of criminal procedure. 124 S.Ct. at 2526. In reaching that conclusion, the Court stated that new rules of procedure generally do not apply retroactively unless they are "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. *Summerlin*, 124 S.Ct. 2523. In order to qualify as a "watershed" rule, the Court opined that the rule must be one

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[1] As previously mentioned, *Ring* required that aggravating factors for death penalty purposes be proved to a jury rather than a judge.

"without which the likelihood of an accurate conviction is seriously diminished." *Id.*

In determining whether *Ring* announced a"watershed" rule "without which the likelihood of an accurate conviction is seriously diminished," Justice Scalia framed the issue very carefully:

> The question here is not, however, whether the Framers believed that juries are more accurate fact finders than judges (perhaps so--they certainly thought juries were more independent. Nor is the question whether juries actually are more accurate fact finders than judges (again, perhaps so). Rather, **the question is whether judicial fact finding so "seriously diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach.**

Summerlin, 124 S.Ct. at 2525 (internal citations omitted; emphasis added). Thus, according to the *Summerlin* majority, the test for determining whether *Ring* constituted a "watershed" rule was whether the pre-*Ring* rule (which allowed for judges to find aggravating factors for death penalty purposes) was impermissibly inaccurate.

In applying that test, the *Summerlin* majority stated that the evidence was simply too equivocal to support the conclusion that the pre-*Ring* standard-- which allowed judges to find aggravating factors for death penalty purposes -- was impermissibly less accurate than the new *Ring* rule. According to the majority, the evidence showed that there was a continuous disagreement among many "presumably reasonable minds," over whether juries were better

factfinders than judges.[2] Because of the disagreements among so many "presumably reasonable minds," Justice Scalia stated that "we cannot confidently say that judicial factfinding seriously diminishes accuracy." *Id.* Thus, the *Summerlin* majority did not give *Ring* retroactive effect because it did not announce a rule "without which the likelihood of an accurate conviction [was] seriously diminished." *Id.* at 2523.

B. The Pre-*Crawford* Rule Was Unreliable, Unpredictable and Inaccurate

Determining *Crawford*'s retroactivity in light of *Summerlin* leaves little question that the *Bockting* Panel was correct and that en banc consideration is not necessary. *See Bockting*, 399 F.3d at 1016. In determining the retroactivity of *Crawford*, the issue should be framed in the same manner as the issue in *Summerlin*: whether the pre-*Crawford* rule of *Ohio v. Roberts*, 448 U.S. 56 (1980))[3] so "seriously

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[2] The evidence Justice Scalia was referring to included: 1) the fact that for every argument why juries were more accurate fact finders, there was another why they were less accurate; 2) members of the Court had previously opined that judicial sentencing may yield more consistent results because of judges' greater experience; and 3) the right to a jury trial has received a mixed reception in other countries throughout the world, suggesting it is implausible that judicial factfinding seriously diminishes the accuracy of the proceeding so as to produce an impermissibly large risk of injustice. *See Summerlin*, 124 S.Ct at 2525.

[3] Under *Roberts*, the Sixth Amendment's Confrontation Clause did not bar admission of an unavailable witness's statement against the accused if the statement "[bore] adequate indicia of reliability." 448 U.S. at 66, *abrogated by Crawford*, 541 U.S. 36. To meet the *Roberts* test, the evidence must have either fallen within a "firmly

diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S.Ct. at 2525.

The language of *Crawford* answers the question: *Roberts* was inherently unpredictable, inconsistent, and unreliable. The same cannot be said for *Ring v. Arizona*. *Ring* was not concerned with the jury-trial's effect on the reliability and accuracy of criminal convictions. Thus, it was not given retroactive effect in *Summerlin*. The issue in *Ring* was strictly constitutional; whether the Sixth Amendment required jury findings on the aggravating circumstances necessary to impose the death penalty. *Ring* itself emphasized that point. In response to Arizona's suggestion that judicial authority over the finding of aggravating factors "may ... be a better way to guarantee against the arbitrary imposition of the death penalty," the *Ring* majority quoted a portion of Justice Scalia's concurring opinion in *Apprendi v. New Jersey*, wherein he stated "[t]he Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)). The Court dispensed with Arizona's suggestion by recognizing that the jury-trial guarantee "has never been efficient, but it has always been free." *Id.* (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)). Thus, it is apparent that *Ring* was not concerned with the accuracy and reliability of the jury-trial guarantee. The tone and substance of *Crawford*, on the other hand, focused almost exclusively on

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rooted hearsay exception" or had "particularized guarantees of trustworthiness." *Id.*

the Confrontation Clause's effect on the reliability and accuracy of criminal convictions. In fact, in *Crawford*, Justice Scalia highlighted the Confrontation Clause's impact on the accuracy of criminal convictions by referring to the trial of Sir Walter Raleigh, who was convicted of treason and sentenced to death. *Crawford*, 541 U.S. at 44, 62. At his trial, Raleigh was denied the opportunity to confront his accuser, Lord Cobham, "with many of the arguments a court applying *Roberts* might invoke today." *Id.* at 62. One of Raleigh's trial judges later stated that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* at 44. The Raleigh trial, and others like it, led to statutory and judicial reforms whereby English law developed a right of confrontation to limit these injustices. *Id.*

In *Crawford*, the Court used the injustices suffered by Raleigh to emphasize the negative impact *Roberts* had on criminal convictions. Under *Roberts*, Lord Cobham's accusations would have been admitted against Raleigh despite the fact that Raleigh was denied the right to cross-examine him and try to expose his accusation as a lie. *Id.* at 62. The "reliability framework" established in *Roberts* was referred to by the *Crawford* majority as being "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations." *Crawford, v. Washington*, 541 U.S. 36, 63 (2004). The court described the *Roberts* "reliability" rule as "an amorphous, if not entirely subjective, concept...[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.* The *Crawford* majority reinforced the unpredictability of *Roberts* by stating "the instant case is a self contained demonstration of *Roberts*' unpredictability and inconsistent application." *Id.* at 66.

To further cement the unpredictability and inconsistency of the *Roberts* framework, the *Crawford* majority showed how lower courts, in assessing the reliability of a given statement, often "wind up attaching the same significance to opposite facts." *Id.* at 63.[4] The Court went on to state that "the unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. As evidence of that fact, the Court cited a litany of cases where, under *Roberts*, courts routinely admitted accomplice confessions implicating the accused. *Id.* at 63-64 (explaining that even though the Court previously thought *Roberts* would bar accomplice confessions implicating the accused, courts routinely admit them). The Court also cited a study that found "appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases--more than one-third of the time. Id. at 64 (citing Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L.Rev. 87, 105 (2003)).

By going to great lengths to prove that the *Roberts* framework was unpredictable and inconsistent, Justice Scalia's majority opinion in *Crawford* established that the *Crawford* rule "implicated the fundamental fairness and accuracy of the criminal proceeding" in a way that the sentencing scheme in *Summerlin* did not. Because the

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[4] An example of this kind of analysis occurred in the trial of this case. A counselor secured by the District Attorney testified that the reason that the child, in numerous meetings with the counselor, denied that the sexual abuse by her father had occurred, was because she was a sexual abuse victim; no consideration was given to an alternative explanation: the child insisted to the counselor that Bockting had not abused her because he had not abused her.

purpose of the Confrontation Clause is to promote accuracy, the *Bockting* Panel considered the unequivocal evidence showing that "cross-examination seriously decreases the possibility of inaccurate convictions" and correctly decided to give *Crawford* retroactive effect. *Bockting*, 399 F.3d at 1017. That decision should not be disturbed by this Court. The Appellee's Petition should be denied.

C. *Crawford* Comfortably Falls Into The "Narrow Class of Rules"

The Appellee argues against giving retroactive effect to *Crawford* by mistakenly claiming that, under *Teague*, the class of rules deserving retroactive effect should be so exceedingly small that "new rules of procedure would almost never apply." Appellee's Petition at 12. In support of its position, the Appellee repeatedly cites to a statement in *Summerlin* where the Court stated that the "class of rules (deserving retroactive effect)is extremely narrow, and 'it is unlikely that any...has yet to emerge.'" 124 S.Ct. at 2523 (*quoting Tyler v. Cain*, 533 U.S. 656, 667 n.7 (2001)). Because the *Summerlin* decision was issued only three and a half months after *Crawford*, the Appellees' suggest that the statement from *Summerlin* is somehow instructive on the retroactivity of *Crawford*:

> [i]t is instructive to the issue at hand that this statement by the Supreme Court was included in the *Schriro* decision, handed down only three and a half months after the *Crawford* decision issued. In it, the Supreme Court announced that it was a virtual conclusion that no new procedural rules of the magnitude sufficient to qualify as exceptions to the non-retroactivity rule had yet been created — even after the issuance of the Crawford decision.

Petition at 13 (emphasis added). Not only is the Appellees' position flawed, but it misstates key words from *Summerlin*.

The *Summerlin* Court never stated, as the Appellee's claim, that a rule deserving retroactive status had "yet to be created." To the contrary, *Summerlin* specifically stated that it was unlikely that such a rule had "yet to emerge." 124 S.Ct. at 2523. There is a meaningful difference between "creating" a constitutional rule and having the rule "emerge" before the Supreme Court for retroactivity purposes. Thus, the fact that *Summerlin* stated that no such rule had "yet to emerge" does not, as Appellees purport, end the debate over whether *Crawford* applies retroactively.

The *Bockting* Panel considered the Appellee's argument and rejected it as follows:

> Admonitions such as in *Summerlin* offer discouragement but no guidance. Because our job is not to conjure up hidden meaning [as Appellees now request] we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of *Summerlin*.

Bockting, 399 F.3d at 1016.

The opinion in this case relied upon the reasoning and analysis in *Summerlin* to support its conclusion that *Crawford* should be given retroactive effect: "[j]uxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the criminal proceeding..." *Bockting*, 399 F.3d at 1016. Although *Teague* and its progeny set a strong presumption in favor of

nonretroactivity, the bar is not absolute.[5] *Crawford*'s cross-examination requirement meets the Supreme Court's retroactivity criteria.

Unlike other cases involving important constitutional rights, including *Ring*, *Crawford*'s impact on the accuracy of criminal proceedings is unequivocal. If *Crawford* does not fit within the class of retroactive procedural rules, it would be hard to conjure up a rule that would. En Banc consideration is not necessary to reach that conclusion.

IV.

UNDER ANY STANDARD, THE ERRONEOUS ADMISSION OF THE CHILD'S STATEMENTS TO THE DETECTIVE CANNOT BE CONSIDERED HARMLESS.

The only evidence which connects Mr. Bockting to sexual molestation of Autumn Bockting was the hearsay statements of Autumn introduced through the police officer and her mother. There was no DNA; there was no confession; the mother did not testify that she had seen anything occurring. At the Preliminary Hearing and to the prosecutor-selected counselor, the child denied that the events happened.

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[5] The State cites to both pre- and post-*Teague* cases for examples of rules which have not been applied retroactively. The State does not mention that rules affecting a criminal defendant's rights to confrontation of witnesses have repeatedly been held to apply retroactively prior to the enactment of AEDPA and the decision in *Teague*. *See Berger v. California*, 393 U.S. 314 (1969); *Roberts v. Russell*, 392 U.S. 293 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972).

Even if the child's statements to her mother were admissible, the admission of the testimony of the detective cannot be deemed harmless under either a "harmless beyond a reasonable doubt" standard, *Neder v. United States*, 527 U.S. 1 (1999) or a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The panel held,

> The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict.

Opinion at 399 F.3d 1022.

Laura Bockting's credibility was at issue due to the rocky relationship between the couple, the fact that she waited over two days to take the child to the hospital, her testimony that immediately after she said she was told about the molestation, she left the child alone with Appellant, and her background as an alcohol and drug abuser. See Statement of Facts in Opening Brief. The hearsay statements introduced through the police officer were critical to the prosecutor's case in order to corroborate Laura Bockting. En banc consideration is not required to determine that the critical nature of this testimony had substantial influence in determining the jury's verdict.

V.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,589.

Respectfully submitted,

/s/
FRANNY A. FORSMAN
Federal Public Defender

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed June 1, 2005]

MARVIN HOWARD BOCKTING, Petitioner-Appellant,	)
v.	)
ROBERT BAYER, Respondent-Appellee.	)

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding
D.C. No. CV-98-00764-ECR

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

The opinion filed February 22, 2005, slip op. 1991, and appearing at 399 F.3d 1010 (9th Cir. 2005), is amended as follows:

At 399 F.3d 1022, slip op. 2012, strike the last paragraph of Part II. Substitute the following paragraph:

> The final question is whether admission of Autumn's statement "had substantial and injurious effect or

> influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing, and weaknesses in Laura Bockting's testimony. Even if Autumn's statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant as corroborating evidence that its admission had a substantial and injurious effect or influence in determining the jury's verdict. Thus, the admission of Autumn's statement requires reversal.

The petition for panel rehearing is DENIED. The petition for rehearing en banc is pending before the Court. No further petitions may be filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed August 11, 2005]

MARVIN HOWARD BOCKTING,)
Petitioner-Appellant,)
)
v.)
)
ROBERT BAYER,)
Respondent-Appellee.)
)

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

Judge McKeown votes to deny the petition for rehearing en banc, and Judge Noonan so recommends. Judge Wallace recommends granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc rehearing.

The petition for rehearing en banc is **DENIED.**

DISSENT

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, KLEINFELD, GRABER, GOULD, TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc.

Judge Wallace's dissent ably explains why the court errs in holding that the new rule established in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 158 L. Ed. 2d 177 (2004), applies retroactively. *See Bockting v. Bayer*, 399 F.3d 1010, 1024 (9th Cir. Feb. 22, 2005) (Wallace, J., concurring in part and dissenting in part). I write only to add a few additional reasons why I believe the majority's holding--which conflicts with the conclusion of all five other circuits to have reached the issue, *see infra* at 10406-07--is in serious tension with the retroactivity jurisprudence of the Supreme Court as well as our own court. With respect, I believe that we have erred in failing to rehear this case en banc.

I

A

The last time the Supreme Court had occasion to reverse this circuit's holding that a new rule of criminal procedure applied retroactively, it instructed us as follows: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (internal quotation marks, brackets, and citation omitted). It seems to me that the majority ignores the emphasis that the Court itself placed on the word "seriously." Almost any new rule will work to a criminal defendant's advantage in some circumstances. The question, though, is

whether *Crawford*'s new rule is of the magnitude of the one ruling that the Court has told us *would* apply retroactively--namely, the one articulated in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), that a defendant has the right to be represented by counsel.

Yet *Crawford* hardly bears comparison with *Gideon*. To deny a criminal defendant charged with a serious crime the benefit of counsel is to put him awash in a sea of doctrines, deadlines, and technicalities, in which his ability to defend his own interest is highly unlikely to survive. While we value individual autonomy enough to permit defendants to represent themselves when they so insist, *see Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), we do so knowing that such autonomy comes at a serious cost to our confidence in the ultimate verdict. *Id.* at 833. It is thus reasonable to say that, without counsel, "the likelihood of an accurate conviction is *seriously* diminished."

The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), in which out-of-court statements not subject to cross-examination were admissible if they bore adequate indicia of reliability, and the new regime in which they are *per se* inadmissible, is small in comparison to the difference between giving a defendant competent counsel and giving him none at all. *Cf. Sawyer v. Smith*, 497 U.S. 227, 244, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) ("But given that [the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231

(1985),[1]] was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness' of the type that may come within *Teague*'s second exception." (citation omitted)). It is thus apparent that the "narrow right . . . that [Crawford] affords to defendants in a limited class of . . . cases . . . possesses little of the 'watershed' character envisioned by *Teague*'s second exception." *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997).

B

Indeed, *Crawford*'s rule does less to decrease the chance of an inaccurate conviction than many rules that have been held *not* to apply retroactively. Most recently, in *Schardt v. Payne*, ___ F.3d ___, 2005 U.S. App. LEXIS 13569 (9th Cir. 2005), we refused to give retroactive effect to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which invalidated state sentencing guidelines that increased a defendant's sentence based on facts found by a judge by a mere preponderance of the evidence. *Id.* at 2537-38. The application of a mere *preponderance* standard instead of the reasonable-doubt standard required by *Blakely* surely increases the likelihood of inaccurate criminal punishment more than the admission of evidence under the *Roberts* test

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[1] *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

did.[2] *Cf. Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S. Ct. 1951, 32 L. Ed. 2d 659 (1972) (per curiam) ("[T]he reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual error." (quoting *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); *id.* at 205 ("[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."). If even the standard-of-proof aspect of *Blakely* does not satisfy the *Teague* test, I do not see how *Crawford* can do so.

C

Also instructive is *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993), in which the Supreme Court considered the retroactivity of the Seventh Circuit's

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[2] Of course, *Blakely* relates to the accuracy of sentences, not underlying convictions. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (relying, in part, on that difference in holding *Apprendi* not to apply retroactively). I do not see how the difference can be material, though, when the point of *Blakely* and the entire line of jurisprudence stemming from *Apprendi* is precisely that sentencing factors must be treated as elements of a crime when they increase the defendant's maxi-mum sentence. Moreover, the Supreme Court has not distinguished between sentences and convictions when applying *Teague*; rather, it has implied that a watershed rule could be retroactive under *Teague* if it "seriously diminished the likelihood of obtaining an accurate determination in [a] sentencing proceeding." *Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (first alteration in original) (internal quotation marks omitted).

holding that certain jury instructions in Illinois violated due process because they "allowed the jury to return a verdict of murder even if the jury made findings that should have resulted in a verdict of voluntary manslaughter," *Falconer v. Lane*, 905 F.2d 1129, 1130 (7th Cir. 1990). Under the challenged instructions, the Seventh Circuit had noted, "no matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict." *Id.* at 1136. Applying *Teague*, the Supreme Court noted that "the *Falconer* court expressed concern that the jury might have been confused by the instructions in question," but nevertheless refused to apply the rule retroactively because it did not "fall[] into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Gilmore*, 508 U.S. at 345 (quoting *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993)).

Thus even a rule forbidding a jury instruction that concededly permits the jury to convict the defendant of a crime he did not commit is insufficiently fundamental and accuracy-enhancing to warrant retroactive application under *Teague*. Again, the *Bockting* majority's holding is in serious tension with that of the Supreme Court. The only evidence admissible before *Crawford* but now excluded consists of out-of-court testimonial statements that trial and appellate courts have explicitly found to bear adequate indicia of reliability. It is difficult to see how the introduction of such evidence could be more likely to lead to the conviction of an innocent defendant than a set of jury instructions that significantly misdefine the substance of the crime.

D

The *Bockting* majority points out, of course, that the *Craw-ford* Court severely criticized the 'indicia of reliability' test that held sway under *Roberts*. And so it did. *See Crawford*, 541 U.S. at 62-65. The Court's criticism, however, is primarily of the test's doctrinal unmanageability, *see id.* at 63 (criticizing the *Roberts* test as "unpredictable" and "amorphous"), and its incompatibility with the Framers' intentions, *see id.* ("The unpardonable vice of the *Roberts* test [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."); *id.* at 65 (conceding that "most of the usual safeguards of the adversary process attend the [admitted out-of-court] statement" but noting that "the single safeguard missing is the one the Confrontation Clause demands.") Neither of those criticisms goes directly to the crucial question, which is whether "the likelihood of an accurate conviction is *seriously* diminished" when evidence is admitted under the *Roberts* test.

The test may have been unpredictable *at the margins*, as almost any balancing test will be to one degree or another, but nothing in the *Crawford* opinion suggests that trial and appellate judges were likely to admit clearly unreliable evidence in anything but the exceptional case. Indeed, the Court stated that the vagueness of the *Roberts* test "might be a small concern in run-of-the-mill . . . prosecutions," even if it could leave defendants unprotected in "great state trials" in "politically charged cases like [Sir Walter] Raleigh's." *Id.* at 68.

Nor, of course, can the Court's emphasis on the stark incompatibility between the *Roberts* test and the Framers' understanding of the Confrontation Clause be taken to imply

that the *Roberts* test dramatically increases the likelihood of an inaccurate conviction. "That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction." *Bockting*, 399 F.3d at 1029 (Wallace, J., concurring in part and dissenting in part); *cf. Crawford*, 541 U.S. at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner.").

E

In that respect and others, *Crawford*'s rule resembles nothing so much as the *last* new rule we held to apply retroactively, only to be quickly reversed by the Supreme Court. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), we gave retroactive application to the Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that juries and not judges must determine the existence of any aggravating factor necessary for imposition of the death penalty. *See Summerlin*, 341 F.3d at 1108-21. In *Ring*, the Court had emphasized that "the guarantees of jury trial in the [Constitution] reflect a profound judgment about the way in which law should be enforced and justice administered." 536 U.S. at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). The Court had thus held that the Constitution reflects the Founders' insistence that the fairness and accuracy of criminal prosecutions (and imposition of the death penalty) are best guaranteed by giving the defendant the ability to insist that relevant facts be decided by a jury. *See id.*; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (noting that jury factfinding is

necessary "to guard against a spirit of oppression and tyranny on the part of rulers.").

Nevertheless, when we held that *Ring* applied retroactively because it was a watershed decision of criminal procedure without which the fairness and accuracy of a death sentence were seriously diminished, *see Summerlin*, 341 F.3d at 1108-21, the Supreme Court quickly reversed us. *See Summerlin*, 124 S. Ct. at 2524-26. Even though the Constitution demands factfinding by juries--and even though juries *may*, in fact, be more accurate factfinders than judges--the Court held that there is not sufficient evidence to demonstrate that "judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct that the law does not reach." *Id.* at 2525 (internal quotation marks and brackets omitted).

A parallel principle governs this case: even though the Confrontation Clause demands the exclusion of out-of-court testimony--and even though blanket exclusion of such testimony may, in fact, be more accurate than the more nuanced rule of *Roberts*--there is little reason to think that judicial determination of reliability so seriously diminishes accuracy as to make likely the conviction of the innocent. If *Apprendi*, *Ring*, and *Blakely*, with their massive implications striking to the core of our system of criminal justice, were not watershed rules with retrospective application, then surely the *relatively* minor--though still quite significant--change wrought by *Crawford* is not either.[3]

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[3] The Seventh and Tenth Circuits have each argued that the watershed status of the *Crawford* rule is further belied by the fact that violations of the Confrontation Clause are subject to harmless-error review and thus are not structural error on par with the denial of counsel. *See Brown v. Uphoff*, 381 F.3d 1219 at 1226-27;

II

And such has been precisely the conclusion of every other circuit to have considered the question. *See Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. Feb. 23, 2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. Apr. 1, 2005); *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. Apr. 7, 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *see also Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (strongly suggesting that *Crawford* does not apply retroactively). It was the conclusion reached by Judge Wallace in his convincing dissent. *See Bockting*, 399 F.3d at 1024 (Wallace, J., concurring in part and dissenting in part). It was the unanimous conclusion of three judges of this court in an earlier, unpublished disposition. *See Hiracheta v. Att'y*

Murillo v. Frank, 402 F.3d 786 at 791. The *Bockting* majority rejects this reasoning, arguing that even non-structural constitutional rules can constitute watershed, bedrock rules of procedure. *See Bockting*, 399 F.3d at 1020. Whether or not the majority is correct, though, its holding flatly contradicts our holding and reasoning in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi* did not apply retroactively on collateral review. The *Sanchez-Cervantes* panel concluded that "by applying harmless error analysis . . . to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule." *Id.* at 670. The *Bockting* majority does not even cite *Sanchez-Cervantes*, and--whether or not the rationale in that case was correct--the conflict between the two opinions provides another reason to rehear *Bockting* en banc.

Gen'l, 105 Fed. Appx. 937, 938 (9th Cir. 2004) (unpublished memorandum disposition).[4]

Even the Supreme Court itself has indirectly suggested that the *Crawford* rule is not retroactive. In its opinion in *Summerlin*--issued well *after Crawford* and written by Justice Scalia, who also authored the opinion in *Crawford*--the Court stated that the class of retroactively applicable rules "is extremely narrow, and it is unlikely that *any* has yet to emerge." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks, ellipsis, and brackets omitted) (emphasis added) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)). The *Bockting* majority argues that this pronouncement from the Court "offer[s] discouragement but no guidance." *Bockting*, 399 F.3d at 1016. But we treat even Supreme Court dicta with "due deference," *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996), and the Court's statement suggests that our holding that *Crawford* applies retroactively is likely to meet the same fate as our similar holding in *Summerlin* with regard to *Ring*--namely, speedy reversal.

The two-judge *Bockting* majority thus stands alone in its conviction that *Crawford* applies retroactively. Its holding will have serious consequences: it will open the door for a slew of habeas petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements. Concerns about taxing the state and federal governments'

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[4] I cite *Hiracheta* not as precedent, of course, but because a conflict with a previously issued memorandum disposition is a factor weighing in favor of rehearing en banc. *See* Ninth Circuit Rule 36-3(b)(iii).

resources to retry convicted criminals should not prevent us from granting writs of habeas corpus when the Constitution requires it. But those concerns certainly counsel us to consider very carefully any precedent that will lead to the granting of an unknowable--but likely large--number of such writs. *See Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 2511, 159 L. Ed. 2d 494 ("In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." (quoting *Teague v. Lane*, 489 U.S. 288 at 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334) (citations omitted)).

III

Because *Bockting* conflicts with the decision of every other circuit to have considered the retroactivity of *Crawford*; because it conflicts with our own decision in *Hiracheta*; and, most of all, because it was wrongly decided, I respectfully dissent from our order denying rehearing en banc.

4

No. 05-595

FILED
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SUPREME COURT, U.S.

In the
Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I. WHETHER THIS COURT'S DECISION IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004) APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW UNDER THE STANDARD OF *TEAGUE V. LANE*, 489 U.S. 288 (1989).

II. WHETHER 28 U.S.C. § 2254 (d) ADOPTS THE EXCEPTIONS TO RETROACTIVITY UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), FOR PRIVATE CONDUCT BEYOND CRIMINAL PROSCRIPTION, AND WATERSHED RULES.

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In the
Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The order denying the Director's petition for rehearing en banc (Joint Appendix 213) (hereinafter "JA") is reported at 418 F.3d 1055. The order amending the opinion of the Ninth Circuit (JA 211) is reported at 408 F.3d 1127. The original opinion of the Ninth Circuit (JA 116) is reported at 399 F.3d 1010. The order of the Ninth Circuit directing the parties to file simultaneous briefs (JA 85) is unreported. The opinion of the district court (JA 61) is unpublished.

JURISDICTIONAL STATEMENT

The original judgment of the court of appeals reversing the judgment of the district court and granting the Respondent's petition for writ of habeas corpus was entered on February 22, 2005. The court of appeals entered an order amending the original decision on June 1, 2005. The Court of Appeals denied the Director's petition for rehearing en banc, with nine judges dissenting, on August 11, 2005. The Director filed his petition for writ of certiorari on November 7, 2005, within ninety (90) days after the denial of the petition for rehearing en banc. Sup. Ct. Rule 13(3). The petition for writ of certiorari was granted on May 15, 2006. The Director invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

2. Section 1 of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

3. 28 U.S.C. § 2254(d) provides:

   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In January, 1988, Marvin Bockting had moved to Las Vegas, Nevada, and was living in a motel with his wife, Laura, his six-year-old step daughter, Autumn, and a three-year-old child that the couple had in common. JA 62. Bockting worked as a handyman at various jobs during the day and cared for children at night while Laura attended business college. JA 46. On Saturday night, January 16, 1988, when Bockting was absent from the residence, Autumn woke up frightened and sobbing. JA 46, 62. Autumn eventually told her mother about Bockting's sexual attacks upon her. JA 46-47, 57. Autumn was reluctant to reveal the incidents because Bockting had previously threatened her that he would "beat her butt" and that "mom would make dad leave." JA 46-47, 57.

Autumn told her mother that Bockting had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," until "white bubbly stuff" came out and went into her mouth, and that "he put his chin on her pee-pee." JA 47, at n.1, 56. Autumn's mother thereafter confronted Bockting and made him leave. JA 57. As Bockting was leaving the residence, Autumn wanted to hug and kiss him. JA 57.

On Tuesday, January 19, 1988, Laura took Autumn to the hospital where a gynecologist and obstetrician examined her under general anesthesia. JA 57. That examination revealed a recent tear in the rectal sphincter and a wide opening in the hymenal ring. JA 47. The examining doctor testified at trial that the injuries were consistent with an application of "blunt force" trauma. JA 62. The doctor also testified that the rectal injury had occurred within the last week. JA 63. Bockting had been the only male around Autumn during that prior week. JA 63, 58 at n.8.

Detective Zinovitch of the Las Vegas Metropolitan Police Department attempted to interview Autumn at the hospital. JA 47. However, Autumn was visibly distraught and was only able to say that someone had hurt her. JA 47. Several days later in a recorded interview, Detective Zinovich again met with Autumn and was able to effectively interview her. JA 47, 56. Autumn relayed the same information that she had previously revealed to her mother. JA 47, 55. Autumn also demonstrated the incidents to Detective Zinovich through the use of anatomically correct dolls. JA 48, 55. When using the dolls, Autumn demonstrated positions that would have been necessary for the acts to take place between a large adult male and a small female child. JA 48, 56. Autumn also explained how she held onto the sink while Bockting pressed against her "real hard" from behind when describing the act of anal intercourse. JA 56. Bockting was later arrested and charged with four counts of sexual assault on a minor under fourteen years of age. JA 45, 48.

At the preliminary hearing, the prosecutor questioned Autumn about the incidents of sexual abuse. JA 8-9. The child was able to answer questions about the difference between the truth and a lie, but became very upset when questioned about being touched by Bockting. JA 8-9, 14-21,

119-20. Autumn initially stated that Bockting touched her in a way he should not. JA 14. However, she eventually stated that she could not remember how Bockting touched her. JA 16, 48. Although she could remember talking to her mother and the detective, she could not remember what she had told them. JA 16-17, 48. The court asked Laura Bockting to comfort her daughter at the stand in an effort to enable her to respond to the questioning. JA 18, 48. That effort failed, and the judge declared the child an unavailable witness. JA 22, 48-49. The defense did not have an opportunity to cross-examine the child. JA 63, 120. Based upon the testimony of Laura Bockting and Detective Zinovitch, however, Bockting was bound over to stand trial in the district court. JA 120.

2. On August 15, 1988, Bockting's trial commenced in the Eighth Judicial District Court of Nevada. JA 63. When Autumn was called to testify at trial, she became very distraught and the court ruled that she was an unavailable witness. JA 24-25, 49, 63. The State sought to have Autumn's hearsay statements made to her mother and Detective Zinovitch admitted under Section 51.385 of the Nevada Revised Statutes, allowing hearsay testimony for an unavailable witness. JA 49. After an evidentiary hearing, the district court ruled in favor of the prosecution, but also ruled that the defense could present to the jury Autumn's testimony that was presented at the preliminary hearing. JA 63. The three-day jury trial resulted in a guilty verdict against Bockting on three counts of sexual assault on a minor under the age of fourteen. JA 63-64. The trial court sentenced Bockting to serve two consecutive life sentences with the possibility of parole and a concurrent life sentence with the possibility of parole. JA 63-64.

Bockting appealed his conviction to the Nevada Supreme Court, where he first alleged that his constitutional right to

confront adverse witnesses had been denied. JA 41-42, 64. Bockting argued that he was denied his right to cross-examine his stepdaughter because unreliable hearsay statements attributed to the victim were admitted into evidence pursuant to NRS 51.385. JA 42. On June 22, 1989, the Nevada Supreme Court concluded that Bockting's appeal had no merit and dismissed the appeal. JA 41-42.

Bockting then applied to the United States Supreme Court for a writ of certiorari. On June 28, 1990, The United States Supreme Court issued an opinion vacating the Nevada Supreme Court's Order Dismissing Appeal that was filed on June 22, 1989. JA 44. The matter was remanded back to the Nevada Supreme Court for consideration in light of *Idaho v. Wright*, 497 U.S. 805 (1990). JA 44. On March 8, 1993, the Nevada Supreme Court issued its lengthy and reasoned Opinion affirming Bockting's conviction. JA 45-60.

On March 30, 1994, Bockting filed a proper person Petition for Post-Conviction Relief in the Eighth Judicial District Court. JA 64. That matter was finally disposed of on December 24, 1997, when the Nevada Supreme Court filed its Order Dismissing Appeal, upholding the lower court's order denying the petition. JA 64-65.

3. Bockting then turned to the federal courts, seeking habeas corpus relief pursuant to 28 U.S.C. §2254. Among other claims not at issue here, Bockting alleged in Ground 1 that his rights under the Confrontation Clause had been violated by the admission of the victim's hearsay statements. JA 65. The district court ultimately denied Bockting's petition, holding that the Nevada Supreme Court's post-remand decision was neither contrary to, or involved an unreasonable application of, clearly established federal law. JA 61-84.

On April 26, 2002, the district court issued a certificate of appealability on Bockting's Confrontation Clause claim.

4. After oral argument before a three judge panel in the Ninth Circuit Court of Appeals, but prior to the rendering of a decision, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Ninth Circuit then requested supplemental briefing with respect to whether the *Crawford* decision should apply retroactively to this case and specifically to the resolution of the Confrontation Clause issue. JA 85-86. Shortly thereafter, a deeply divided panel issued an opinion holding that *Crawford* applies retroactively under *Teague v. Lane,* 489 U.S. 288 (1989), and granting the petition for a writ of habeas corpus. JA 116-77.

The two judges in the majority applied different reasoning. Judge McKeown concluded that *Crawford* announced a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), because it "disavow[ed]" the test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). She further concluded, however, that *Crawford* fits within the second *Teague* exception for bedrock rules of criminal procedure. Judge McKeown reasoned that "the purpose of the Confrontation Clause is to promote accuracy" and that "it is no leap to conclude that the right to cross-examination as an adjunct to the constitutional right to confrontation joins the very limited company of *Gideon [v. Wainwright*, 372 U.S. 335 (1963)]," which is the paradigmatic example of a bedrock rule of criminal procedure falling within the second exception. JA 132.

Judge McKeown further ruled that habeas relief may be granted even though 28 U.S.C. § 2254(d) authorizes federal courts to grant such relief only when the state court decision was either "contrary to, or involved an unreasonable

application of, clearly established Federal law." She reasoned that this Court has impliedly held that Congress intended AEDPA "to adopt the *Teague* exceptions" and that, "even if Congress' intent is unclear, the constitutional doubt canon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process." JA 136. She went on to conclude that the Nevada Supreme Court's decision—which followed this Court's express directive on remand to apply *Idaho v. Wright*, 497 U.S. 805 (1990)—was contrary to "established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*." JA 136.

Finally, citing to *Neder v. United States*, 527 U.S. 1 (1999), Judge McKeown concluded that the admission of the hearsay statements was not harmless beyond a reasonable doubt. JA 137.

Judge Noonan's concurrence created the necessary majority and agreed with the conclusion that *Crawford* applies retroactively but found that it is not a "new rule" within the meaning of *Teague*. JA 138-39. Instead, *Crawford* corrected a misinterpretation of a prior rule. "A change in rationale is not treated by the Supreme Court as a change in rules...All along, the bedrock was there." JA 141 (citations omitted). Judge Noonan stated his support of the *Crawford* rule as it should apply to this case. According to Judge Noonan, the six-year-old victim dreamed up the sexual attacks and then felt compelled to repeat these statements to the detective in a "psychological compulsion to not let her mother down." JA 139. Judge Noonan's suspect view of the evidence supported his belief of how wise it is to exclude testimony that is unsupported by cross-examination. JA 139-40. He

concluded by stating that, in the alternative, he concurred in Judge McKeown's analysis and opinion. JA 140-41.

Judge Wallace dissented. He had little difficulty concluding that *Crawford* announced a new rule, observing that, before *Crawford*, courts could admit hearsay evidence against a criminal defendant whenever the defendant was unavailable and the evidence had "adequate indicia of reliability." JA 144 (quoting *Roberts*, 448 U.S. at 66). *Crawford* "emphatically rejected *Roberts's* approach to testimonial evidence" and "replaced *Roberts* with a new test that has two requirements: 'unavailability and a prior opportunity for cross-examination.'" JA 144 (quoting *Crawford*, 124 S. Ct. at 1374).

Judge Wallace then concluded that the second *Teague* exception does not apply, emphasizing that the standard, under this Court's recent decision in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004), is whether the prior procedural rule "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." JA 147 (internal quotation marks and citation omitted). Judge Wallace concluded that the admission of "testimony which has been judicially determined to bear 'adequate indicia of reliability' (as *Roberts* required), but which has not necessarily been subjected to cross-examination (as *Crawford* requires)" does not "'so seriously diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach.'" JA 148 (quoting *Summerlin*, 124 S. Ct. at 2525).

5. The Ninth Circuit panel subsequently amended its original decision, noting that it had applied the wrong standard for harmless error analysis. JA 211-12 The panel instead applied the standard for harmless error under *Brecht*

v. Abrahamson, 507 U.S. 619 (1993), to determine whether the admission of Autumn's statement "had substantial and injurious effect or influence in determining the jury's verdict." JA 211-12. Without explanation, the panel was again skeptical that Laura Bockting's testimony was admissible, but dismissed it as "weak." JA 212. Without discussing the corroborating physical evidence, the panel focused instead on the child-victim's inconsistent statements made at the preliminary hearing. JA 211-12. Based upon those two factors, the panel believed that the detective's statements were so significant as corroborating evidence that its admission had a substantial and injurious effect on the jury's verdict. JA 212. Therefore, the admission of the child's statements did not constitute harmless error. JA 212.

6. Nine judges dissented from the denial of the Director's petition for rehearing en banc. JA 213-24. Judge O'Scannlain, writing for the dissenting judges, agreed with Judge Wallace's reasoning and expressed several additional objections to the majority's holding. The dissent stated that "*Crawford* hardly bears comparison with *Gideon*," pointing out that *Crawford* did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right." JA 215. The dissent noted that "*Crawford's* rule resembles nothing so much as the *last* new rule we held to apply retroactively, only to be quickly reversed by the Supreme Court" in *Schriro v. Summerlin*. JA 220.

The dissent further pointed out that "every other circuit to have considered the question"—including two since the date of the panel's original decision—has reached the contrary conclusion. JA 222-23. Finally, the nine dissenting judges noted that the court's holding "will have serious consequences" for "it will open the door for a slew of habeas

petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements." JA 223.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) applied retroactively to Respondent Bockting's collateral habeas case, under the standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Crawford* overturned the earlier rule in *Ohio v. Roberts*, 448 U.S. 56 (1980) which permitted the admission of hearsay evidence at trial if the evidence bore particularized indicia of reliability, and replaced that rule with one which requires that testimonial hearsay evidence be inadmissible unless there was a prior opportunity for cross-examination. The Ninth Circuit correctly noted that the *Crawford* rule was a new procedural rule, but mistakenly held that it fell under the *Teague* exception to the presumption of nonretroactivity because it established a watershed rule on par with the rule of *Gideon v. Wainwright* 372 U.S. 335 (1963). The holding that *Crawford* established a watershed rule was erroneous because the *Crawford* rule does not meet the standards of the *Teague* exception. The new rule of *Crawford* is not one without which the likelihood of an accurate conviction is seriously diminished, and it is not a sweeping new rule reflecting a procedure that is implicit in the concept of ordered liberty. The Ninth circuit stands alone in its conclusion that *Crawford* is retroactive, as six other circuit courts, and numerous state appellate courts, have held that it is not.

The Ninth Circuit reached its singularly anomalous conclusion that *Crawford* should receive retroactive application by engaging in two analytical errors. First, the

court focused on the wrong issue, concentrating its analysis on the general right to confrontation rather than the specific rule in *Crawford*. Second, the court thereafter proceeded to apply an improper, watered-down standard to the question of whether the *Crawford* rule was a watershed rule by substantially reducing the standard for accuracy, and by defining the bedrock prong of the test in terms of the accuracy prong, thereby excising the second prong from the standard. By misfocusing its analysis and then applying an erroneous standard to the inquiry, the Ninth Circuit reached the wrong conclusion. The circuit court erred further in finding that the A.E.D.P.A. amendments of 1996 (Antiterrorism and Effective Death Penalty Act), specifically 28 U.S.C. § 2254 (d)(1) and (2) codified the *Teague* exception for watershed rules, when it found that the Nevada Supreme Court's 1993 decision in Bockting's remanded direct appeal was contrary to or involved an unreasonable application of clearly established federal law as determined by this Court eleven years later in *Crawford*.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING THAT *CRAWFORD* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW VIOLATES THIS COURT'S RULING IN *TEAGUE V. LANE*, 489 U.S. 288 (1989).

A. *Teague* and its progeny create a strong presumption that new procedural rules generally do not apply retroactively to cases on collateral review.

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court held that, in most instances, new rules do not apply

retroactively to cases on collateral review. When a decision of this Court announces a new rule, that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, (1987); *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). As to cases that have become final, a new rule will apply only in limited circumstances. A new *substantive* rule will generally apply retroactively to cases on collateral review. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998).[1] Substantive rules are those that alter the scope of criminal liability for an offense. Substantive new rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal, or faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 348, 352 (internal quotations omitted).

New rules of *procedure*, however, generally do not apply retroactively, as they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, a more "speculative connection to innocence." *Summerlin*, 542 U.S. at 352. Because of this more speculative connection to innocence, this Court gives

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[1] New substantive rules which place particular conduct or persons covered by the statute beyond the State's power to punish them have sometimes been referred to as an exception to the *Teague* bar to retroactivity. This Court in *Summerlin* referred to them as substantive rules not subject to the bar. *Summerlin*, 542 U.S. at 352, n. 4. "Rules that fall within what we have referred to as *Teague's* first exception 'are more accurately characterized as substantive rules not subject to [*Teague's*] bar." *Beard v. Banks*, 542 U.S. 406, 411, n. 3 (2004).

retroactive effect "to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

It is not enough that a new procedural rule is "fundamental" in some abstract sense. New procedural rules will be given retroactive effect in a collateral proceeding only when the two elements of *Teague's* second exception are present: (1) the new procedural rule must be one without which the likelihood of an accurate conviction is *seriously* diminished, *Summerlin*, 542 U.S. at 352; and (2) it must be one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). The Court has held that the pre-*Teague* rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), guaranteeing a criminal defendant the right to counsel at trial is a rule that would satisfy this exceedingly high standard. *Beard v. Banks*, 542 U.S. 406, 417 (2004). No other new rule has ever been cited as an example of one reaching this unique status. Other important new rules, such as, *inter alia*, the right to a jury trial in serious state criminal cases, have been found to be *non-retroactive* to cases on collateral review. *See Summerlin*, 542 U.S. at 356-57.

The Court has described the second *Teague* exception as applying only to a "small core of rules requiring observance of those procedures that...are implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417. It is not enough that a new rule may be described as being "sweeping and fundamental". *Beard*, 542 U.S. at 418. More is required. The Court has repeatedly noted that this class of new procedural rules is extremely narrow, and has recently found that "it is unlikely that any...'ha[s] yet to emerge.'" *Summerlin*, 542 U.S. at 352, citing *Tyler v. Cain*, 533 U.S.

656, 667 n.7 (2001); *accord, Sawyer v. Smith*, 497 U.S. at 243.

Since *Teague* in 1989, no new rule has been found by this Court to be retroactive, despite the Court's having considered the application of at least twelve new procedural rules. See *infra*, at 31, et seq. Moreover, a growing number of circuit courts of appeal, now numbering six, have held that *Crawford* is not retroactive. *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004); *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006).[2] The two circuit courts that considered the retroactivity of *Crawford* after the Ninth Circuit's *Bockting* decision explicitly rejected that court's holding. *Espy*, 443 F.3d at 1367; *Lave*, 444 F.3d. at 336. "The two judge *Bockting* majority thus stands alone in its conviction that *Crawford* applied retroactively." JA 223 (O'Scannlain, J. dissenting).

The Ninth Circuit's rationale for finding *Crawford* retroactive is unsound. The Ninth Circuit engaged in

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[2] In addition, an ever expanding number of State appellate courts have held that *Crawford* is not retroactive to cases on collateral review: *Drach v. Bruce*, ___ P. 3d ___, (Kan. 2006); *Edwards v. People*, 129 P.3d 977 (Colo. 2006); *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005); *In re Moore*, ___ Cal. Rptr. ___, (Cal. App., 4th Dist., Div. 1 2005); *Danforth v. State*, 700 N.W. 2d 530 (Minn. App. 2005); *In re Markel*, 154 Wash. 2d 262, 111 P.3d 249 (2005); *State v. Williams*, 695 N.W. 2d 23 (Iowa 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004); *but see, State v. Forbes*, 119 P.3d 144 (N.M. 2005) (retroactive under "unique facts and procedural posture").

numerous analytical errors in reaching its conclusions about *Crawford's* retroactivity. The court applied an improperly diluted standard for watershed rules, and in so doing it misconceived and misapplied both the accuracy prong and the bedrock principle prong of *Teague's* second exception. The court confused and conflated the role of a new rule in the *Teague* analysis with the wholly distinct underlying fundamental right the new rule was crafted to support. The circuit court's lengthy and largely irrelevant discussion of the Confrontation Clause in general, to the exclusion of any meaningful analysis of the *Crawford* rule, allowed the court to misdirect its focus on inapplicable externalities. Finally, the circuit court misconceived and misstated the constitutional purpose behind the *Crawford* rule, and disregarded the role that harmless error plays in Confrontation Clause trial error. These errors led the Ninth Circuit to veer off course in its analysis of the retroactivity question, and to erroneously conclude that *Crawford* stated a watershed rule that is retroactive. These errors led the court to grant Bockting habeas corpus relief.

B. *Crawford* Announced A New Procedural Rule.

When an inmate raises a claim in a collateral proceeding that implicates *Teague*, the first foundational task is to determine whether the relief sought would create, or would require the retroactive application of, a "new rule" for purposes of *Teague*. *Sawyer*, 497 U.S. at 233. A case announces a new rule when it "breaks new ground or imposes a new obligation on the States or the Federal Government": a case announces a "new rule" of constitutional law if the result "was not *dictated* by precedent existing at the time defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original); *see also Saffle*, 494 U.S. at 488.

Crawford constitutes a new rule, as it definitively changed the process for deciding when, and whether, hearsay testimony is admissible, shifting the factfinding process from a judge to the jury. To constitute a new rule, the superseding rule need not amount to a radical departure from its predecessor. This Court has held that it is enough if the new rule amounts to a "modification" of the former rule. For example, in analyzing the *Batson* rule in *Teague*, the Court made the observation that, in setting forth a more detailed process for challenging a prosecutor's peremptory challenges at trial, it "modified" its earlier decision, yet still held it was a new rule. *Compare Batson v. Kentucky*, 476 U.S. 79 (1986) *with Swain v. Alabama*, 380 U.S. 202 (1965). *Batson* certainly did not change the underlying Equal Protection principle of *Swain*, or the constitutional policy behind the general rule. What changed with *Batson* was the *mechanics* of the showing required to state such a claim before the trial court. The *Crawford* rule represents at least as great a departure from existing law than that illustrated by *Batson*, because *Crawford* established a new process for finding testimonial hearsay evidence reliable by shifting the inquiry from sufficient indicia of reliability to the opportunity for prior cross-examination. *Crawford* therefore represents a change in the existing law at least as significant as the then-new *Batson* rule, and, likewise, stands as a new rule.

The *Crawford* Court itself described its decision as revising existing law to reflect more accurately the original understanding of the Confrontation Clause. In so doing, it explicitly rejected the "particularized guarantees of trustworthiness" test of *Roberts* and its progeny:

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees

> of trustworthiness.' 448 U.S., at 66, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: it admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations...The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one...

Crawford, 541 U.S. at 60-62.

These words stand as a break from the *Roberts* rule. The Court rejected the "open-ended balancing test" it had applied in *Roberts* and replaced it with a "categorical constitutional guarantee" that the Court ruled was constitutionally prescribed. *Crawford*, 541 U.S. at 67. The Court expressly elected to overrule *Roberts*, instead of following it by simply reweighing its reliability factors and finding that the particular evidence at issue fell short. *Crawford*, 541 U.S. at 66-67. Clearly, a decision announces a new rule if it expressly overrules a prior decision. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Under these principles, *Crawford* announced a "new rule" within the meaning of *Teague*. Indeed, the concurring Justices in *Crawford* characterized the opinion as a "new rule" that overruled *Roberts*. *Crawford*, 541 U.S. at

75 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

Not surprisingly, all of the circuit courts that have addressed the issue have concluded that *Crawford* crafted a new rule for *Teague* purposes. See JA 132 (McKeown, J.); JA 153 (Wallace, J., dissenting); *Brown*, 381 F.3d at 1226; *Bintz*, 403 F.3d at 866; *Dorchy* 398 F.3d at 788; *Espy*, 443 F.3d at 1366.

Further, the new rule of *Crawford* is a *procedural* rule. This Court held in *Summerlin* that:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See, *Bousley, supra*, at 620-621,118 S.Ct. 1604 (rule 'hold[s] that a ...statute does not reach certain conduct' or make[s] conduct criminal'); *Saffle, supra*, at 495, 110 S.Ct. 1257 (rule 'decriminalize[s] a class of conduct [or] prohibit[s] the imposition of...punishment on a particular class of persons'). In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. See *Bousley, supra*, at 620, 118 S.Ct. 1604.

Summerlin, 542 U.S. at 353. This Court in *Summerlin*, then, utilized a functional test to determine whether a new rule is procedural: those that regulate the *manner* of determining the defendant's culpability are procedural. This characterization succinctly and precisely describes the operation of the *Crawford* rule. *Crawford* does not articulate any prohibition on the power of a criminal law-making authority to proscribe individual conduct, does not decriminalize a class of conduct, and does not prohibit the imposition of punishment on a

particular class of persons. *See*, *Summerlin*, 542 U.S. at 353. Rather, *Crawford* regulates the manner in which evidentiary reliability is determined within the context of testimonial hearsay evidence—requiring the opportunity for prior cross-examination, rather than sufficient indicia of reliability. Because *Crawford* regulates the manner of admissibility of certain evidence, and does not alter the range of conduct or the class of persons that the law punishes, it is a procedural rule.

C. *Crawford* did not state a watershed rule under *Teague v. Lane*, 489 U.S . 288 (1989).

1. The two conjunctive prongs of the watershed standard from *Desist* and *Mackey* must be fully and independently analyzed.

The Ninth Circuit erred in granting habeas corpus relief to Bockting by holding that the *Crawford* rule should be retroactively applied to his collateral case on the ground that it created a watershed rule. The rule of *Crawford*, while important, is not a watershed rule. *Crawford* overturned the *Roberts* procedure of allowing a judge to determine the reliability of an out-of-court statement, and replaced it with the rule that testimonial hearsay is admissible only if the declarant is unavailable to testify, and the defendant has had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 64-67. This new rule is neither one without which the likelihood of an accurate conviction is seriously diminished, nor one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding.

Crawford was based on the Court's determination that the Confrontation Clause reflects a "judgment, not only about the

desirability of reliable evidence...but about how reliability can best be determined", labeling judicial findings of reliability in the hearsay context as "surrogate" to the framers' intent. *Crawford*, 541 U.S. at 61-62. The rule of *Crawford* "renegotiat[ed] the boundaries between admissible and inadmissible evidence", where this Court "endeavored to reinstitute 'the constitutionally prescribed method of assessing reliability.'" JA 146 (Wallace, J., dissenting). In shifting the locus of reliability determinations from sufficient indicia of reliability to the opportunity for prior cross-examination, *Crawford* "reshaped the contours" of the long-established right to confrontation. JA 215 (O'Scannlain, J., dissenting). This reshaping neither created a new rule without which the likelihood of an accurate conviction is seriously diminished, nor a new rule rising to the level of a sweeping bedrock rule that is implicit in the concept of ordered liberty on par with *Gideon*.

All of the circuit courts that have considered the issue of the retroactivity of *Crawford*, save for the Ninth Circuit, have held that it was not retroactive. The Ninth Circuit was able to deviate from the unanimity of other circuits' holdings because it applied a watered-down standard to the question of retroactivity. The erroneous standard applied by the Ninth Circuit allowed the court to draw faulty conclusions about both of the *Teague* second exception prongs, accuracy and bedrock character of the new rule.

As set forth above, this Court has made it abundantly clear that to fall within the second *Teague* "watershed" exception, a new rule must meet two requirements: infringement of the rule must (1) seriously diminish the likelihood of obtaining an accurate conviction, and (2) it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Tyler v. Cain*, 533

U.S. 656, 665 (2001) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). To achieve watershed status, a new rule must be as "sweeping" and fundamentally groundbreaking, that is, core to the criminal process, as the right to counsel created in *Gideon*. *Saffle*, 494 U.S. at 495. *See*, *Beard*, 542 U.S. at 418; *O'Dell*, 521 U.S. at 167.

The Court has, in the past, rebuffed inmates' attempts to reduce the standard of the second *Teague* exception, and the Court has steadfastly held to the position that the high standard set forth in *Teague*, drawn from both *Desist v. United States,* 394 U.S. 244 (1969) and *Mackey v. United States,* 401 U.S. 667 (1971), remains in full force. The argument that a watered-down showing focusing only on generic accuracy should be sufficient to define watershed rules was soundly rejected by this Court in *Sawyer*, 497 U.S. at 242-43. The inmate in *Sawyer* argued that the second *Teague* exception should apply to new capital sentencing rules that "preserve the accuracy and fairness of capital sentencing judgments." *Sawyer*, 497 U.S. at 242. The Court rejected this attempt to dilute the standard, and held that the definition of watershed rules continues to include *both* of its constituent components from *Desist* and *Mackey*:

> In *Teague* we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to watershed rules of fundamental fairness. *It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required.* A rule that qualifies under this exception must not only improve accuracy, but also ' alter our understanding of the bedrock procedural elements' essential to the

> fairness of a proceeding. *Teague*, supra, 489 U.S., at 311, 109 S.Ct., at 1076...

Sawyer, 497 U.S. at 242 (emphasis added). The Court rejected the attempt to reduce the *Teague* standard by finding that "[a]cceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist*, but later abandoned in *Mackey*...". *Sawyer*, 497 U.S. at 242.

The Ninth Circuit found that *Crawford* was retroactive because it applied an analytical process that was virtually identical to that rejected by this Court in *Sawyer*, by applying a watered-down standard to the question of whether the *Crawford* rule was a watershed rule. The application of a faulty standard led the circuit court to grant relief to Bockting.

2. The rule announced in *Crawford* does not satisfy the accuracy prong of the watershed definition.

a. The *Crawford* rule is not one without which the likelihood of an accurate conviction is seriously diminished. While cross-examination may be seen as a tool or procedure for determining the reliability of testimony in criminal trials, *Crawford*, 541 U.S. at 61-62, this Court recognized in *Crawford* that confrontation does not necessarily result in any increased accuracy at all, and that hoped-for increased accuracy was *not* the basis for the decision:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in

> a particular *manner*: by testing in the crucible of cross-examination."

Id. at 61. According to this Court, then, it was not an assurance of increased reliability that served as the driving force behind *Crawford*; rather it was fidelity to the historically correct constitutional *process*: that reliability be assessed in a particular *manner*, that the confrontation process follow the procedural rules established by the Founders.

Indeed, in many cases *Crawford* will work to *diminish* accuracy, because *Crawford* will, in some cases, bar the admission of highly reliable evidence that would have been admitted under *Roberts*. As the Second Circuit noted in *Mungo*:

> As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy. . . . At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries. We recognize that *Crawford's* rule derives from the principle that cross-examination is a better engine of truth-determination than a judge's assessment of the reliability of uncross-examined hearsay. *Crawford*, 124 S.Ct. at 1370. We do not question this principle. But it does not necessarily follow that the *Crawford* rule will improve

> the accuracy of the process. For the requirement of cross examination will, in cases where the declarant is not available to be called for cross-examination, simply result in the exclusion of the testimony altogether. Where testimony was admissible under the old rules precisely because it was reliable, these applications of *Crawford* will diminish, rather than increase, the accuracy of the process.

Mungo, 393 F.3d at 335. *Accord*, *Bintz*, 403 F.3d at 867.

These conclusions have been strengthened by the Court's recent decision in *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 2266 (2006), explicitly limiting *Crawford* to testimonial evidence. *Davis* instructs that non-testimonial evidence, whether reliable or not, is simply beyond the reach of the Confrontation Clause. This bolsters the conclusion that *Crawford*'s contribution to accuracy overall is small. (Indeed, because non-testimonial hearsay evidence of questionable reliability that would have been excluded under *Roberts* will not excluded under *Crawford* and *Davis*, the *Crawford* decision may have the effect of reducing accuracy.)

b. In reaching the opposite conclusion on the accuracy prong, the Ninth Circuit panel made a series of errors. Foremost among them, the Ninth Circuit conflated two fundamentally distinct principles—the court conflated the new rule of *Crawford* with the underlying right of confrontation on which that new rule was based. See JA 128 (explaining that confrontation, *in general*, was designed to "promote" and to "augment" accuracy in the factfinding process). In essence, the circuit court focused it analysis solely on the benefits of confrontation *in general*, rather than on the operation of the *Crawford* rule specifically. This confusion of the new rule

with the underlying right allowed the court to draw erroneous conclusions about the new rule's effect on accuracy.

There is no doubt, and the Petitioner does not dispute the conclusion, that confrontation, as a general proposition, benefits accuracy in factfinding. But the general benefits of confrontation are not at issue in this case, and the circuit court asked the wrong question. As pertains to the first prong of the watershed standard, the relevant inquiry is not whether confrontation, in general, is beneficial, or whether confrontation is a fundamental right; the only relevant question is much narrower: whether infringement of the *Crawford* rule seriously diminishes the likelihood of obtaining an accurate conviction (along with the second relevant inquiry, whether the rule alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding). *Tyler*, 533 U.S. at 665.

This Court has never equated a new rule with the relevant underlying right on which the rule was premised in conducting a *Teague* analysis. Just the opposite is true. New rules invariably are premised on important, fundamental rights, yet none has been held to be retroactive. Likewise, new rules also invariably have some benefit to fact-finding accuracy, and yet this Court has found that no new rule can compare with *Gideon*.

Many new rules that implicate fundamental rights of defendants, such as due process or the Eighth Amendment, and that were designed to augment accuracy in fact-finding, have been held to be non-retroactive. For example, in *Lambrix v. Singletary*, 520 U.S. 518 (1997), the Court held that the accuracy-enhancing rule of *Espinoza v. Florida*, 505 U.S. 1079 (1992) was not retroactive (new rule held that vague "wicked, evil, atrocious, or cruel" aggravating factor

in shared jury/judge determination of capital sentence violated prohibition against aggravators that fail to provide jury with direction as to what it must find in order to impose death sentence). Likewise, in *O'Dell v. Netherland*, 521 U.S. 151 (1997), the court held that the accuracy-enhancing rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994) was not retroactive (new rule held that capital jury could not base sentencing determination on possibly false belief about defendant's future custody status). In *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court held that the accuracy-enhancing rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) was not retroactive (new rule held that capital jury could not base sentencing determination on false belief that appellate court held responsibility for sentence). In drawing conclusions about the accuracy prong, the Ninth Circuit's focused its analysis on the wrong target.

The Ninth Circuit's second core error was in misstating the effect on accuracy that the new rule must have, and thereby reducing the *Teague* standard even further. The panel simply held that, for *Teague* purposes, accuracy enhancement is enough: "The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy..." JA 128. This view of the *Teague* standard grossly understates the accuracy element. Under this reduced standard, any new rule that enhances accuracy might well qualify for watershed status; yet no such new rule ever has.

As the dissent below noted, however, "the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is 'one without which the likelihood of an accurate conviction is *seriously* diminished.' *Summerlin*, ___ U.S. ___, 124 S.Ct. at 2523 (internal quotation marks

omitted)." JA 149-50 (Wallace, J., dissenting). Had the majority applied the *Teague* analysis as this Court has many times, it would have reached the conclusion of every other court that found that *Crawford* was not retroactive.

3. The rule announced in *Crawford* does not satisfy the bedrock prong of the watershed definition.

As noted earlier, to meet the watershed exception, a new rule must be as "sweeping" and fundamentally groundbreaking as the right to counsel established in *Gideon*. A comparison of *Crawford* to *Gideon*, and to the many new rules that this Court has found not to be watershed, confirms that *Crawford* belongs in the non-watershed camp. In holding that *Crawford* was a watershed rule, the Ninth Circuit committed multiple errors.

a. The *Crawford* rule differs substantially from *Gideon* in its scope, breadth, character, and operation. *Crawford* is considerably narrower, substantially less of a departure from existing law, and has far less impact on factfinding accuracy overall. Moreover, *Crawford* cannot begin to approach *Gideon's* core, bedrock, and fundamental procedural character in guaranteeing fairness in the criminal process.

The *Crawford* rule modified the then-existing regime for finding testimonial hearsay evidence admissible within the narrow confines of testimonial hearsay evidence. It replaced an existing rule that was, itself concerned with the reliability of evidence with a new rule that was also concerned with reliability (albeit only as a procedural guarantee, rather than substantive). And unlike *Gideon*, *Crawford* did not announce the *creation* of a new fundamental right *ex nihilo*:

> The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980)...and the new regime...is small in comparison to the difference between giving a defendant competent counsel and giving him none at all.

JA 215 (O'Scannlain, J., dissenting).

The right to confront pre-existed *Crawford*, whereas the right to counsel in State prosecutions did not pre-exist *Gideon*. The difference is important. In renegotiating and reshaping the boundaries between admissible and inadmissible evidence, this Court in *Crawford* did not create a new fundamental right as it had in *Gideon*, but reworked the operation of an existing one. In shifting the locus of reliability determinations from judges to juries within the narrow confines of testimonial hearsay evidence, *Crawford* merely "reshaped the contours" of the long-established and pre-existing right to confrontation. JA 215 (O'Scannlain, J., dissenting).

Further distinguishing the *Crawford* rule from *Gideon* is the former's amenability to harmless error analysis. This Court has held that error arising from violation of the Confrontation Clause is subject to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). *Crawford* cannot be a watershed rule if confrontation violations can be harmless. *Brown*, 381 F.3d at 1226-27; *Murillo*, 402 F.3d at 791; *see also Coleman v. United States*, 329 F.3d 77, 89-90 (2d Cir.), *cert. denied*, 540 U.S. 1061

(2003) ("it would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural'—i.e., that they do not inherently deprive defendants of 'basic protections,' or 'substantial rights' —and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure") (citations omitted); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), *cert. denied*, 537 U.S. 1098 (2002). Nothing in *Crawford* suggests otherwise. By contrast, just as *Gideon* is the paradigm of a watershed rule, so too is a *Gideon* violation the paradigm of structural error as to which the harmless error doctrine does not apply. *See*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Finally, to be properly characterized as a rule that alters the understanding of bedrock procedural elements, a new rule must be "sweeping" in its application. *Beard*, 542 U.S., at 418; *see also*, *Sawyer*, 497 U.S. at 241-242. When compared to *Gideon*, *Crawford* is not a sweeping rule. *Crawford* is concerned only with the narrow subject matter of "testimonial statements." *Davis*, 126 S.Ct. at 2274. Much hearsay evidence that would have fallen under the protection of *Roberts*—non-testimonial hearsay—is no longer considered even implicated by Confrontation Clause protections. While the *Roberts* rule itself was narrow in that it was concerned only with hearsay statements, *Crawford* substantially narrowed the breadth of the protections offered by the Confrontation Clause as defined by *Roberts* even further by limiting those protections to testimonial evidence. Under *Crawford* (as elaborated on in *Davis*) an entire category of evidence that was inadmissible under *Roberts*—non-testimonial hearsay evidence not shown to be reliable—is now not inadmissible (that is, it is outside of the parameters of the Confrontation Clause). Because the already narrow confrontation rule of *Roberts* has been further narrowed in its scope and breadth by *Crawford*, it cannot be said that the new

rule of *Crawford* is sweeping in the sense that *Gideon* is, a rule that applies to *all* defendants in *all* serious cases.

b. This Court's many precedents rejecting the characterization of new rules as watershed demonstrate that the new rule of *Crawford* is not a bedrock rule. The Court's *Teague* decisions show that many important new rules, many focusing on increased accuracy and of much greater breadth and scope than *Crawford*, have been held to be non-retroactive.

Although it has had more than a dozen opportunities to analyze whether new rules were watershed rules under *Teague*, the Court has never held that a new rule was so sweeping and fundamental as to have attained this very unique status. *Teague* itself, for example, declined to apply retroactively the new rule of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson*, of course, protects criminal defendants against the discriminatory use of peremptory challenges. There is nothing "mere" in *Batson*, yet it was not applied retroactively.

Beyond *Teague*, the Court decided against retroactivity in every case where retroactivity was at issue. *See, e.g. Butler v. McKellar*, 494 U.S. 407 (1990) (declining to apply retroactively the new rule of *Arizona v. Roberson*, 486 U.S. 675 (1988) concerning post-invocation questioning); *Saffle v. Parks*, 494 U.S. 484 (1990) (declining to apply retroactively the proposed new rule forbidding anti-sympathy instruction); *Goeke v. Branch*, 514 U.S. 115 (1995) (declining to apply retroactively the proposed new rule disallowing the dismissal of an appeal for the failure of a defendant to appear for sentencing); *Gray v. Netherland*, 518 U.S. 152 (1996) (declining to apply retroactively the proposed new rule concerning notice of evidence for defendant); *Graham v.*

Collins, 506 U.S. 461 (1993) (declining to apply retroactively proposed new rule overturning Texas special issue regime on grounds that sentencers could not give effect to offered mitigating evidence); *Gilmore v. Taylor*, 508 U.S. 333 (1993) (declining to apply retroactively rule announced in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) requiring instruction on "mitigating mental state"); *Caspari v. Bohlen*, 510 U.S. 383 (1994) (declining to apply retroactively proposed new double jeopardy rule); *Sawyer v. Smith*, 497 U.S. 227 (1990) (declining to apply retroactively the new rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) forbidding jury to be misled about its sentencing responsibility); *Beard v. Banks*, 542 U.S. 406 (2004) (declining to apply retroactively the new rule of *Mills v. Maryland*, 486 U.S. 367 (1988) regarding non-unanimity of jurors in finding mitigating factors; *O'Dell v. Netherland*, 521 U.S. 151 (1997) (declining to apply retroactively the new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994) regarding jury's correct understanding of defendant's future custody status when considering future dangerousness aggravator); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (declining to apply retroactively the new rule of *Espinoza v. Florida*, 505 U.S. 1079 (1992) regarding jury/judge weighing of invalid aggravators); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (declining to apply retroactively the new rule of *Ring v. Arizona*, 536 U.S. 584 (2002) forbidding sentencing factfinding by judges).

Each of the new rules found by this Court to be non-retroactive was important, and each was premised on, and closely related to, an important or fundamental right of criminal defendants. Yet none passed the *Teague* test. These results are not surprising. That a new rule relates to an important or fundamental right does not make the new rule itself fundamental. This conclusion has been implicit, if not

explicit, in all of these decisions. The Ninth Circuit simply misfocused its analysis.

Among the Court's decisions holding against retroactive application of new rules, three decisions—*Sawyer*, *Summerlin*, and *O'Dell*—are especially instructive in illustrating the error of the Ninth Circuit in holding for the retroactivity of *Crawford*. Each of these cases declined to apply new constitutional rules retroactively when those new rules were designed to improve the fairness, accuracy, and reliability in the criminal process, and were premised on a fundamental right. These decisions demonstrate that a decision is not a watershed decision simply because it has some effect on accuracy, or because it is fundamental in some abstract sense.

In *Sawyer*, the Court declined to retroactively apply the *Caldwell* rule. *Caldwell* held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rested elsewhere. *Caldwell*, 472 U.S. at 328-29. The Court held that the decision in that case was premised on the need for fairness, reliability and accuracy in the capital sentencing process, and the need to avoid bias against the defendant. *Id.* at 330. The Court further found that bias against a capital defendant would emerge from the fact that juries would believe that they could freely err in their decision because the error would be corrected on appeal. *Id.*, at 331.

In spite of the *Caldwell* rule's explicit focus on accuracy, reliability, and fairness, the Court in *Sawyer* found the new rule to be important but not watershed; the improvement over existing law that protected the same underlying fundamental right was insufficient:

> The *Caldwell* rule was designed as an *enhancement of the accuracy* of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systematic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness'.

Sawyer, 497 U.S., at 244 (emphasis added).

Likewise, the Court held in *O'Dell* that the new rule of *Simmons v. South Carolina* was not retroactive. *O'Dell*, 521 U.S. at 167-68. In *Simmons*, the Court held that, in the sentencing phase of a capital case, when the State argues for future dangerousness, and state law forbids parole, the Due Process Clause requires that the trial court instruct the jury that the defendant is parole ineligible. *Simmons*, 512 U.S. at 168-69. The decision was premised on concerns of fairness and accuracy, in that not informing the jury about the defendant's parole ineligibility creates a real possibility that the jury will sentence the defendant on the false belief that he will be released if he is sentenced to life, creating a "false choice". Allowing a capital jury to sentence a defendant based on a misperception of fact or law creates a situation where the defendant could be executed without having had an opportunity to explain or deny the information. *Simmons*, 512 U.S. at 161. Citing *Gardner v. Florida*, 430 U.S. 349 (1977), the Court held that the practice of sentencing a defendant to death under false assumptions by the jury violated "fundamental notions of due process." *Simmons*, 512 U.S. at 164. It is noteworthy that, in *Simmons*, by arguing that the defendant would be a future danger to society if not executed, the prosecutor implied that the defendant would actually be released, a false fact under South Carolina

law. Yet in *O'Dell*, the Court held that the *Simmons* rule was not on par with *Gideon* because the new rule was narrow, applying to a limited number of cases, in distinction to *Gideon's* broad and sweeping application to all felony cases, and because it did not alter the understanding of the bedrock procedural elements essential to the fairness of the proceeding. *O'Dell*, 521 U.S. at 167.

In *Schriro v. Summerlin*, the Court held that the new rule of *Ring v. Arizona*, 536 U.S. 584 (2002) was not retroactive. In *Ring*, the Court held that juries, and not judges, must make capital sentencing decisions. *Ring*, 536 U.S. at 606-609. Finding an irreconcilable tension between *Walton v. Arizona*, 497 U.S. 639 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that failing to extend the Sixth Amendment right to a trial by jury to capital sentencing proceedings would senselessly diminish that right, since *Apprendi* negated the distinction between elements of a crime and capital sentencing factors. *Ring*, 536 U.S. at 604-05, 609.

After the Ninth Circuit held that *Ring* was retroactive, this Court reversed in *Summerlin*. The Court held that the new rule of *Ring* failed to meet either prong of the *Teague* second exception. The Court held that the accuracy prong did not depend on whether the founding fathers believed juries were more accurate factfinders than judges, or whether juries actually are more accurate; the only issue was whether judicial factfinding so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. *Summerlin*, 536 U.S. at 355-56. The Court found that the evidence that juries were more accurate factfinders was "simply too equivocal" to accept; "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Summerlin*, 536 U.S. at

356. Citing *DeStefano v. Woods*, 392 U.S. 631 (1968), a pre-*Teague* case which the Court brought into the post-*Teague* context by finding it to be "germane", the Court found that while the right to trial by jury in *Duncan v. Louisiana*, 391 U.S. 145 (1968), held to be non-retroactive in *DeStefano*, was designed to prevent arbitrariness and repression, the pre-*Duncan* regime was not so unfair or inaccurate as to require retroactivity. *Summerlin*, 542 U.S. at 357. The Court in *Duncan* held that the right to a jury trial was a fundamental right, a "fundamental principle[ ] of liberty and justice" that was well-established at the time the Constitution was drafted, in existence for several centuries in Anglo-American law, and stood as a bulwark against arbitrariness. *Duncan*, 391 U.S. at 148-151. The Court described the new rule of *Duncan* in language virtually identical to that used to describe the new rule of *Crawford* in its policy and historical foundations. *Duncan*, 391 U.S. at 155-56. *Duncan* was subsequently held to be non-retroactive in *DeStefano*. The *Summerlin* Court concluded that, if an entire trial held without a jury was not impermissibly inaccurate, a trial in which a judge found only aggravating factors also could not be. *Summerlin*, 542 U.S. at 357.

If new rules premised on important and fundamental rights that affect both accuracy and fairness like those analyzed in *Sawyer*, *O'Dell*, *Summerlin*, and *DeStefano* were held to be non-retroactive and, therefore, not on par with the right to counsel in *Gideon*, the new rule of *Crawford*, while important, is, likewise, not a watershed rule.

c. The Ninth Circuit erred in finding that *Crawford* satisfied the high standard for constituting a bedrock rule by applying a faulty standard to this second *Teague* prong for watershed rules. Three specific errors in the rationale of the circuit court can be identified. First, the court found that the

new rule was a bedrock rule because it was not insubstantial. Second, the court found that the new rule was a bedrock rule because the right to confront is a bedrock principle. Third, the court wholly misdefined the concept of bedrock rules, and applied that faulty definition to the question.

The Ninth Circuit first erred in finding that *Crawford* was a bedrock rule because it was not insubstantial. The court commented this "Court's Confrontation Clause jurisprudence in *Crawford* cannot be dismissed as a mere tweak on the admissibility of hearsay. The Supreme Court surely did not conceive of it as such." JA 133 (internal citation omitted). Of course, no court has ever claimed that *Crawford* amounted to a tweaking of existing law. (That is precisely why it established a *new* rule.) But this Court's exceedingly high standard for deciding whether a new rule is a bedrock rule is surely not reflected in the conclusion of the court below that any non-insubstantial new rule attains bedrock status. Amounting to far more than a stylistic characterization, the Ninth Circuit's characterization of the new rule as one that is bedrock because it amounted to more than a tweak of existing law misstated the correct standard, and lowered that standard for the bedrock prong of the watershed rule test.

Second, the Ninth Circuit erred in equating the new rule with the underlying right. This error is evidenced by the court's clear confusion as to the distinction between the two: "That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question." JA 126. As set forth above, much of Ninth Circuit's opinion is devoted to an analysis of the importance of the right to confrontation *generally*. *See, e.g.*, JA 128, 132 ("Recognizing that bedrock procedural rules are very few in number, it is no leap to

conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*."). The circuit court was correct in its observation that the right to confront is fundamental. The court erred, however, in incorrectly assuming that the fundamental nature of an underlying right automatically translates into a conclusion that a new rule *premised on that right* is also sufficiently fundamental, and sufficiently accuracy-enhancing, to achieve watershed status. This Court has never so held. As set forth above in analyzing this Court's *Teague*-based decisions, it is clear that the Court has never countenanced this artificial conflation, as all of this Court's new rules since *Teague* have, in some manner, implicated fundamental rights, and yet none has been held to be retroactive. As the Tenth Circuit has noted: "Not every holding that draws on a wellspring rule is itself a wellspring holding." *Johnson v. McKune*, 288 F.3d 1187, 1199 (10th Cir.), *cert. denied*, 537 U.S. 1050 (2002) (citations omitted). Having used virtually the same eloquence to describe the history, purpose, and place of the right to a jury trial in *Duncan* as it did to describe the right to confront in *Crawford*, this Court went on to find that new rule non-retroactive.

In piggybacking the new rule of *Crawford* onto the much broader underlying right to confront *generally*, the Ninth Circuit erroneously shifted its analytical focus away from the sole relevant question—whether the new rule itself is a watershed rule. While the right to confront, in general, may be a fundamental right, the much narrower new rule of *Crawford*, focused as it is on a narrow, specific circumstance—the admissibility of testimonial hearsay—is not co-extensive with that right, and is not a watershed rule. In fact, each of the new rules found by this Court since *Teague* to be nonretroactive has implicated a fundamental right in some way. That a new rule relates to a fundamental right, as

argued by the Ninth Circuit, is clearly insufficient to bestow watershed status on that rule.

The Ninth Circuit's third error was incorrectly defining the bedrock prong in terms of the accuracy prong, in effect deleting the former from the standard as a distinct element. This deletion is evidenced in the court's statement:

> The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. *Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction*. Summerlin, ___ U.S. at ___, 124 S.Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. See *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)

JA 134.

This conclusion fundamentally misconceives the conceptual foundations of bedrock rules by defining that prong of the watershed rule standard in terms of the other prong—accuracy. By erroneously defining the first *Teague* prong in terms of the second, the circuit court omitted the bedrock requirement from the standard entirely, and erroneously reduced the two prongs into the accuracy prong. This Court has never countenanced this analytical strategy, and, as set forth above, explicitly rejected it in *Sawyer*.

Thereafter, the circuit court weakened the standard even further by characterizing the accuracy element incorrectly, omitting the requirement that the new rule must *substantially*

increase accuracy. While the majority goes to some length to explain the benefits of confrontation and cross examination *in general* ("purpose of the Confrontation Clause is to promote accuracy", JA 128) the panel did not engage in a comparative analysis of the operation of the old rule with that of the new rule within the context of the operation of those rules. The dissent reminded the majority of these shortcomings:

> Thus, the question is not whether testimony that has been subject to cross examination is more likely to be reliable than testimony that has not. Rather, the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is "one without which the likelihood of an accurate conviction is *seriously* diminished.' *Summerlin*, ___ U.S. ___, 124 S.Ct. at 2523 (internal quotation marks omitted).

JA 149-50 (Wallace, J., dissenting).

The *Crawford* rule, narrow in scope and which renegotiated the contours of an existing right, is neither one without which the likelihood of an accurate conviction is seriously diminished, nor one that alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding. The Ninth Circuit reached erroneous conclusions about both of the prongs of the standard for *Teague's* watershed exception by applying an erroneous, watered-down, and misdefined standard for both prongs. This Court's retroactivity decisions since *Teague* demonstrate that the new rule of Crawford does not approach the *Gideon* benchmark for watershed rules.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT § 2254(D) ADOPTED THE *TEAGUE* EXCEPTIONS.

In addition to finding that *Crawford* should be applied retroactively, the Ninth Circuit in *Bockting I*, held that the Antiterrorism and Effective Death Penalty Act ("A.E.D.P.A"), specifically 28 U.S.C. § 2254(d)(1) and (2), adopted the *Teague* exceptions to retroactivity. The circuit court held:

> The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teag e* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.") Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272, 122 S.Ct. 2147. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context.

JA 135.

In finding that § 2254(d) adopted the *Teague* exceptions, the Ninth Circuit erred, as this holding misinterprets the clear language of the statute, as well as previous suggestions by this Court that the *Teague* exceptions were not adopted into the statute. It is unmistakable that there is an inherent tension in the logic of the circuit court. On the one hand, the court held

that the Nevada Supreme Court could not know of the future new rule of *Crawford* when it reheard the direct appeal after remand from this Court in 1993: "As we now know, but the Nevada Supreme Court *could not have divined*, *Crawford* dictates the right to cross-examine the witness." JA 136. (emphasis added). This observation is logical since, by their very definition, new rules are not amenable to prediction. On the other hand, the court held that the Nevada Supreme Court's 1993 decision was contrary to *established* Supreme Court precedent in *Crawford*. *Id.*

28 U.S.C. § 2254 (d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The 1996 A.E.D.P.A. amendments fundamentally changed the landscape of federal habeas corpus practice. This Court has recognized that one purpose of the A.E.D.P.A. amendments was to "circumscribe[]" the ability of a federal court to review a State court's habeas decision. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). This overriding

Congressional policy must be kept in mind when construing the A.E.D.P.A. statutes.

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor wrote for the majority in part II of the opinion. Justice O'Connor noted that one specific congressional goal in passing the A.E.D.P.A. amendments in 1996, and especially 28 U.S.C. § 2254 (d) (1) and (2) was to change the then-existing habeas regime. She further stated that: "It cannot be disputed that Congress viewed § 2254 (d) (1) as an important means by which its goals for habeas reform would be achieved." *Williams*, 529 U.S. at 404. The Court then proceeded to find that the language of § 2254 (d) (1) must be construed, according to "cardinal principle[s] of statutory construction" in a manner that "give[s] effect, if possible, to every clause and word of a statute." *Id.*, at 404. The discussion that follows focuses on the statutes' "contrary to clearly established Federal law" and "an unreasonable application of...clearly established Federal law" clauses. The Court's effort to clarify how these terms should be interpreted gives great insight into how the intimately related statutory language "clearly established Federal law" itself should be read. In recognizing that one purpose of these statutes was to change the existing operation of federal habeas review of State court judgments, and in holding that these statutes must be interpreted according to a common sense reading of the words themselves, the Court provided insight as to the interpretation of the meaning of the term "clearly established Federal law", and the means by which this language ought to be interpreted. In defining the term "contrary", Justice O'Connor turned to its common dictionary meaning. Applying that same strategy to define the related term "established" reveals that the term means to make firm, to institute, or to bring into existence. Webster's New Collegiate Dictionary (1979). This text, therefore, suggests,

along with the recognized purpose of the A.E.D.P.A. amendments to effect change in the operation of habeas review, that under § 2254 (d) (1), congress did not intend to adopt the *Teague* exceptions into the "clearly established Federal law" language, and that the Ninth Circuit's contrary decision was erroneous. Under the plain meaning of the terms as set forth by Congress, habeas corpus relief cannot be granted unless a State court decision is contrary to, that is "diametrically different" from, law that exists at the time the State court decision is made. It is instructive that Congress used the term "established" in the past tense as a participle, rather than using the term "established or to be established", which would have suggested an intent to include the *Teague* exceptions. That Congress specifically used the term "established" in the past tense indicates the intent to measure the correctness of a State court's decision against *existing* law, rather than future law that the State court could, in no way, "divine[ ]". JA 136. While it may be true that Congress can codify existing decisional law, this Court has already recognized that the core purpose of the A.E.D.P.A. amendments, including § 2254, was to effect change in habeas practice, rather than merely to codify existing law. Just as Congress intended to limit the reach of federal habeas corpus to instances where a state court decision is contrary to federal law as determined by this Court, rather than circuit law, the language set forth above indicates a similar intent to limit the reach of the habeas remedy to instances where law is clearly established at the time the state court decision is made. This Court's language set forth above clearly suggests that a rule cannot be both new and clearly established at the same time, and that these conceptual categories are mutually exclusive. The Ninth Circuit's *Bockting* decision is an excellent case in point in demonstrating the exclusivity of these principles—that a 2004 decision of this Court can control a decision of the

Nevada Supreme Court made in 1993 after remand from this Court.

There is no evidence in the language of the statute, or this Court's decisions on the meaning of the term "clearly established Federal law" to support the Ninth Circuit's holding that the statute adopts *Teague's* exceptions. Moreover, the palpable tension in the circuit court's conclusion that a new rule established in 2004 was "clearly established" in 1993 is inescapable. The outcome of such a reading of the statute would be an illogical reading of the words of the statute. This Court has held that it is the "natural reading" of the words themselves within a statutory text that generally controls. *Dodd v. United States*, 545 U.S. 353, 125 S.Ct. 2478, 2482 (2005).

This Court has expressly defined the term "clearly established Federal law" within an unambiguously specific temporal context: in determining the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in § 2254 (d)(1), the Court has explained that the statute meant no more than it expressly commanded. The Court stated:

> Section 2254(d)(1)'s clearly established phrase refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). In other words, clearly established Federal law under §2254 (d)(1) is the governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*. See id., at 405, 413, 120 S.Ct. 1495; *Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed. 2d 914 (2002). In most situations,

> the task of determining what we have clearly established will be straightforward.

Andrade, 538 U.S. at 71-72 (internal quotations omitted) (emphasis added). The plain language of the statute and this Court's words in *Andrade* are dispositive. A.E.D.P.A. was intended to change the law to require that habeas relief cannot be granted unless the State court decision was contrary to this Court's decisions at the time the State court decision was made.

In its ruling below where it read into this statute words that Congress did not set forth, and declared an expanded interpretation clearly at odds with this Court's unambiguous holding in *Andrade*, the Ninth Circuit clearly violated the foundational principle of statutory construction that courts cannot add words to a Congressional enactment. Recently, in construing another A.E.D.P.A. provision relevant to the issue of retroactivity, this Court held that the words of the statute must control:

> [W]e are not free to rewrite the statute that Congress has enacted. '[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' *Tyler v. Cain*, 533 U.S. 656, 663, n.5, 121 S.Ct. 2478, 150 L.Ed. 2d 632 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds').

Dodd, 545 U.S. 353, 125 S.Ct. at 2483 (2005).

Because this Court has defined the phrase "clearly established Federal law" to mean decisions of the Court *"as of the time of the relevant state-court decision"*, the Ninth Circuit, in its AE.D.P.A. analysis, erred in holding that the A.E.D.P.A. amendments codified the *Teague* exceptions. Moreover, the Ninth Circuit's mistaken conflation of the statute with *Teague* conflicts with this Court's command that the phrase "clearly established Federal law" bears only a *slight connection* to our *Teague* jurisprudence", while placing new constraints on the power of federal courts to grant State inmates' habeas applications. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring in part) (emphasis added). *See*, *Ramdass v. Angelone*, 187 F.3d 396, 406 (4th Cir. 1999); *Murillo*, 402 F.3d at 789.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Perine v. Van Note,
4 N.J.L. 146 (1818) 28

Picard v. O'Connor,
404 U.S. 270 (1971) 45

Powell v. Alabama,
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Powell v. Nevada,
511 U.S. 79 (1994) 38

Ramdass v. Angelone,
187 F.3d 396 (4th Cir. 1999) 40

Respublica v. Langcake,
1 Yeates 415 (Pa. 1795) 28

Rose v. Lundy,
455 U.S. 509 (1982) 44

Ross v. Moffitt,
417 U.S. 600 (1974) 24

Sawyer v. Whitley,
505 U.S. 333 (1992) 38

Schriro v. Summerlin,
542 U.S. 348 (2004) 10

Scott v. Illinois,
440 U.S. 367 (1979) 24

Sellan v. Kuhlman,
261 F.3d 303 (2d Cir. 2001) 43

Slack v. McDaniel,
529 U.S. 473 (2000) 44

Smith v. Digmon,
434 U.S. 332 (1978) 43

Solem v. Stumes,
465 U.S. 638 (1984) 22, 38

State v. Webb, 2 NC 103 (1794) 28

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 38

Strickland v. Washington,
466 U.S. 668 (1984) 20

Teague v. Lane,
489 U.S. 288 (1989) . . . . . *passim*

Tyler v. Cain,
533 U.S. 656 (2001) 22, 33

Union Pacific R. Co. v. Laramie Stock Yards Co.,
231 U.S. 190 (1913) 33

United States v. Gonzales-Lopez,
126 S.Ct. 2557 (2006) 23

United States v. Granderson,
511 U.S. 39 (1994) 37

Vasquez v. Stack,
228 F.3d 143 (2d Cir. 2000) 40

Weeks v. Angelone,
176 F.3d 249 (4th Cir. 1999),
affirmed 528 U.S. 225 (2000) 43

Williams (Terry) v. Taylor,
529 U.S. at 362 (2000) 33, 35, 38, 39

Wilson v. Boerem,
15 Johns. 286 (N.Y. Sup. 1818) 28

Withrow v. Williams,
507 U.S. 680 (1993) 38

Statutes

28 U.S.C. § 2244(b)(2) 37

28 U.S.C. § 2244(b)(2)(A) 33, 34, 39, 44

28 U.S.C. § 2244(d)(1) 37, 38

28 U.S.C. § 2244(d)(1)(c) 44

28 U.S.C. § 2254 . . . . . 9, 10, 12

28 U.S.C. § 2254(b) 40

28 U.S.C. § 2254(d) 32, 40-43, 45-46

28 U.S.C. § 2254(d)(1) . . . . . *passim*

28 U.S.C. § 2254(e)(2) 37

28 U.S.C. § 2254(e)(A)(i) 41, 42

28 U.S.C. § 2264(a) 37

Other Authorities

D.R. Bentley, ed., Select Cases from The Twelve Judges' Notebooks 102 (1997) 29

Black's Law Dictionary 1097 (7th ed. 1999) 33

3 William Blackstone, Commentaries 373 15

4 William Blackstone, Commentaries on the Laws of England 318 (1769) 25-26

Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius 294 (5th ed. 1785) 26

1 John Burn, A New Law Dictionary 421 (1792) 27

3 Edward Coke, The Third Part of the Institutes of the Laws of England (1644) 26

141 Cong. Rec. S7478-03 (May 25, 1995) 38

Giles Duncombe, Tryals Per Pais Appendix, 15 (1702) 26

Geoffrey Gilbert, The Law of Evidence 149-150 (1st Amer. ed. 1788), and 152 (1769) 26

Matthew Hale, History and Analysis of the Common Law of England 258 (1713) 15

William Hawkins, A Treatise of the Pleas of the Crown 431 (2nd ed. 1724) 26

William Hening, The New Virginia Justice 148 (1795) 27

William Hening, The New Virginia Justice 279 (1825) 27

Thomas Leach, Cases in Crown Law Determined by the Twelve Judges 346 (1789) 29

Medline Plus, Medical Encyclopedia: "Anal fissure." www.nlm.nih.gov/medlineplus 3-4

Thomas Peake, A Compendium of The Law of Evidence 8 (Phila. 1802) 27

The Law of Evidence 148 (1717) 26

The New-Hampshire Justice of The Peace 163 (1824) 27

Theory of Evidence 111 (1761) 26

4 St. George Tucker, Blackstone's Commentaries 296 n.1. (1803) 27

U.S. Department of Justice, Convicted by Juries Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (1996) 21

12 Charles Viner, A General Abridgment of Law and Equity 118 (2d ed. 1791) 26

Webster's Third New International Dictionary 1940 . . . 33

I.
STATEMENT

A. THE HISTORY OF THE ACCUSATIONS

Laura and Respondent Marvin Bockting were married in 1984. Laura had one child, Autumn, from another relationship at the time. Honesty, a daughter, was born about one year after the marriage. TT, p. 65.[1] The marriage was a rocky one almost from the beginning. The couple separated in 1986 for eight months when Laura was an exotic dancer[2] and had alcohol and drug problems. They reconciled for a short time and then decided to move to Las Vegas to look for work in October, 1987. TT, pp 66-72. Autumn was six and Honesty was three years old.

Autumn, her mother Laura, her sister Honesty, and her stepfather lived in a one room unit of a motel in Las Vegas. Laura described the room as "one bed, full-size bed, a kitchenette about the size [of the witness box], bathroom with no bathtub and a little closet space and that was it and cockroaches everywhere." TT, p. 75.

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[1] The entire trial transcript is not included in the Joint Appendix in order to avoid burdening the record. References in this brief are to "JA" when portions of the transcript have been included in the Joint Appendix; "TT" and "PHT" when the reference is to the trial transcript or preliminary hearing transcript and the section cited has not been included in the Joint Appendix.

[2] While her occupation may not ordinarily be relevant, here, Laura's occupation was relevant because Laura practiced her exotic dance routines at home while Autumn imitated her. TT, p. 177.

On Saturday, January 16, 1988, Marvin left in the morning to go to work but, according to Laura, did not return until the next day. TT, p. 79. At the preliminary hearing in state court, Laura Bockting testified that Autumn woke up at about 10 o'clock p.m.; she was upset but "she wasn't crying." PHT, p. 10. At the time of the trial, Laura Bockting testified that Autumn "was sobbing" when she woke up that night. TT, p. 19. Laura testified, "She looked like she had just woke up from a bad dream..."[3] Laura testified that Autumn told her that "her daddy put his pee-pee in her pee-pee, and that daddy put his pee-pee in her butt..." TT, p. 81. Laura said that Autumn did not tell her what day it had happened but that it was while Laura was in school. Laura testified that Marvin watched the children while she was in class. Laura began an evening vocational class on January 11, 1988 (the Monday of that week). PHT, p.12.[4] Laura Bockting testified to other statements made by Autumn that night including description of acts of cunnilingus, fellatio and

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[3] Judge Noonan's view of the statements was, "It may have been an excited or spontaneous utterance but one made under circumstances rendering it less, not more credible...It is a commonplace phenomenon for people of all ages to have nightmares and awake in distress. What they then say was bothering them carries no guarantee of trustworthiness; they are coming out of sleep, still responding to their sleeping state impressions. Autumn's second declaration was made to a police officer in the presence of her mother; she was under psychological compulsion not to let her mother down." JA 139.

[4] Autumn's testimony at the preliminary hearing conflicted with her mother's testimony at trial. Autumn said that her mother went to school in the morning and that her father did not take care of her while her mother was in school-- Susie, Daniel and Brian did. PHT, p. 31.

anal intercourse. TT, p. 81. Autumn had knowledge of sexual acts because her mother admitted that Autumn had taken showers with Laura and Marvin together and had observed them having sexual intercourse on several occasions. TT, p. 21.

According to Laura, when Marvin finally came home the next morning, the first thing she said to him was, "Where is the money for the rent?" because Marvin had not paid the rent on the room. She took the money from him, and despite the fact that she had supposedly been told by her daughter that she had been sexually assaulted, Laura left Autumn alone with Marvin, paid the rent and changed the "papers" for the room to her name only. TT, p. 86. She said that when she returned, she confronted Marvin; he denied any wrongdoing. Laura told Marvin she was going to take Autumn to be "checked" and Marvin said "I hope you do. I want you to." TT, p. 87. Laura said she waited two days to take Autumn to the hospital but she couldn't remember why she waited. TT, p. 88. Laura did not testify that Autumn experienced painful urination or other pain in her vaginal or rectal area at any time.

When Laura Bockting finally took Autumn to the hospital, Dr. Stacy Rivers examined her. She testified that her examination of Autumn's anus revealed "that there was a tear which, you know, doctors call a fissure..., a small tear that seemed to be healed-healing, I should say, and it was not bleeding at that time." She testified that "within a week there had been a tear of the rectal mucosa." TT, p. 141.[5] She also

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[5] Medline Plus, a Service of the U.S. National Library of Medicine and the National Institutes of Health defines anal fissure as, "a small split or tear of the anal mucosa that may cause painful

found that the hymen was "gaping wide open although it was not bleeding." She observed that "there was no laceration of the septum of the skin between the rectum and the vagina and no other lacerations or foreign bodies found up with the canal of the vagina or the rectum." TT, p. 142. She testified that the stretching of the hymen would have caused pain to the area and painful urination for several days. TT, p. 144.[6] The doctor was unable to estimate any time period when the hymenal stretching occurred and there was no testimony from the mother or anyone else that Autumn suffered any pain at any time relevant to the charges.

Detective Zinovitch, who had received only "on-the-job training with other more experienced detectives within the sexual assault unit," PHT, p. 51, testified that contact with the Police Department was not made until January 19, 1988,

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bowel movements and bleeding. There may be blood on the outside of the stool or on the toilet tissue following a bowel movement." The service describes the causes, incidence and risk factors as follows: "Anal fissures are extremely common in young infants but may occur at any age. Studies suggest 80% of infants will have had an anal fissure by the end of the first year....The incidence of anal fissures decreases rapidly with age. Fissures are much less common among school-aged children than among infants. In adults, fissures may be caused by constipation, the passing of large, hard stools, or by prolonged diarrhea..." Medline Plus, Medical Encyclopedia: "Anal fissure." www.nlm.nih.gov/medlineplus

[6] Defense counsel did not call a medical expert to testify and asked a total of eight questions of Dr. Rivers. The doctor was not asked on either direct or cross-examination, to determine whether the events described by Laura Bockting and the detective as having occurred within about ten days could have happened based upon the medical examination.

over two days after the date Laura Bockting said that Autumn told her about the incident with her father. PHT, p. 41. At that time, he said, Autumn would not talk to him. PHT, p. 42. On January 21, 1988, the detective interviewed Autumn at his office. He picked up Autumn and her mother and transported them to his office. PHT, p. 43. He described Autumn as "very talkative" and not frightened. PHT, p. 43. The detective said that Autumn described the same events that her mother testified to. PHT, p. 44-45.[7] The detective told Autumn about the anatomical dolls which he uses and he had Autumn use the dolls to demonstrate. PHT, p. 47. Laura Bockting testified that she was present when Detective Zinovitch interviewed Autumn. PHT, p. 15.

Before the Preliminary Hearing in the case, Autumn was sent to a counselor by the District Attorney's office. Diane Donovan was a "marriage and family therapist" from the Center for Interpersonal Studies. TT, p. 56. She testified that she saw Autumn once a week starting in March 1988 but did not say how long the treatment lasted. Autumn was seen by herself although her mother was there for parts of some sessions. Ms. Donovan testified at trial that Autumn "doesn't want to acknowledge that it happened." TT, p. 62.

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[7] Amicus Criminal Justice Legal Foundation, citing to the opinion of the Nevada Supreme Court, in its Statement of Facts represents that the interview conducted by Zinovitch was recorded and was "not suggestive, leading or indicative of a predetermined resolve to produce evidence of child abuse." The problem with this representation is that the Nevada Supreme Court could not have known how the interview was conducted as no recording of the interview was ever produced or introduced.

B. Autumn's Court Appearances

Preliminary Hearing

A preliminary hearing was held on April 25, 1988 before a Justice of the Peace. Autumn's testimony started out with a series of questions which she answered apparently without hesitation, including her recall of her discussion with the prosecutor the day before, the difference between the truth and a lie, where she attended school and her performance in school, who babysits her when her mother is in school (Susie, Daniel and Brian), who makes up her family and she identified both her mother and her stepfather in the courtroom. Autumn's testimony at the preliminary hearing is reproduced in full at JA 8-23.

The prosecutor asked her, "Did there come a time when your daddy touched you in a way that you didn't think he was supposed to touch you?" Autumn responded, "Yes." JA 14. She said it happened "A long time ago." Id. She then described an incident that occurred in a bathroom but said she was clothed and she couldn't remember how she was touched. JA 16. She recalled talking to the Detective and she remembered going to a doctor. JA 17. Laura Bockting was moved into the witness chair to console Autumn. Autumn testified that she remembered talking to the detective but not what she told him but she didn't remember what she told her mother. She testified that she did not remember her father saying that anything would happen to her if she told, JA 20, and when her mother told her to "be honest like when you told mommy and when you told Chuck (Zinovitch), that's all you got to say...," Autumn said "You already told them." JA 21. When the judge asked Autumn, "are you afraid that if you tell the truth that your daddy will hurt you?" the child responded "No." Id. Finally, the prosecutor asked Autumn,

"Do you remember what it was that you told your mommy?" she responded "no" and the court declared her unavailable as a witness. JA 22.

Evidentiary Hearing at Trial

On the first day of trial, before the State called its first witness, outside the presence of the jury, the prosecutor called Autumn to testify (apparently as a result of an unreported conversation at the bench).[8] JA 24. The full extent of the examination of Autumn was as follows:

> THE COURT: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State, the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.
>
> All right. Go ahead, counsel.
>
> MR. LUKENS: Autumn, this is when you have to stand up to be sworn.
>
> THE COURT: Can you stand up, Autumn? Can you stand up and raise your hand for me? Autumn, stand up now and raise your hand for us, okay.

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[8] The prosecutor had never intended to call the child as a witness. Two weeks before the trial in this case, the prosecutor filed a notice advising that he intended to elicit her hearsay statements instead of seeking live testimony. JA 26. He had already decided that he did not like what she had to say.

MR. LUKENS: Your Honor, I think under these conditions, I think that the witness is unable to testify.

THE COURT: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

JA 25.[9]

The court concluded,

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of setting.
>
> And this law was set in place, I think, to avoid some of the problems involved there with that kind of a testimony situation. There seems to be nothing that

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[9] Nevada represents that during this hearing, Autumn "became very distraught" Nevada's Brief on the Merits, p. 5, citing to the transcript quoted above and findings by the federal district court. This representation is not supported by the record. It is plausible that, since the prosecutor intended to introduce Autumn's statements through hearsay, she was led to believe by the prosecutor or her mother she needn't say anything.

> would take our case out of the typical situation that the law had contemplated.

TT, p. 35.

Marvin Bockting testified at the trial. As he has throughout this case, he denied that he had committed any of the acts testified to by his estranged wife and Detective Zinovich.

C. Supplemental Procedural History

Respondent accepts the procedural history set forth by Nevada beginning at page five of Nevada's Brief on the Merits but supplements it with the following procedural facts.

Marvin Bockting represented himself from the time of the Nevada Supreme Court's opinion on his direct appeal on March 8, 1993, until October 16, 2002, when the Ninth Circuit Court of Appeals appointed counsel to represent him on the appeal of the denial of his 28 U.S.C. §2254 petition.

His state post-conviction petition was decided at an ex parte proceeding in which testimony was taken but Bockting was neither present nor represented. Exhibit W to Answer, p. 3.[10] The appeal from that decision was decided without counsel or briefing. The Nevada Supreme Court, in dismissing his appeal, held that Bockting failed to prove that his counsel was ineffective even though he was not allowed an opportunity to even be present at the "hearing." Exhibit Z to

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[10] This practice has been subsequently condemned by the Nevada Supreme Court. See Gebers v. State, 50 P. 3d 1092 (Nev. 2002).

Answer. His federal §2254 petition was processed without benefit of the assistance of counsel and without a hearing. After ten years of litigating his case in proper person, he was appointed counsel by the court of appeals.

D. The Ninth Circuit Opinion

The Ninth Circuit held that the rule enunciated in Crawford v. Washington, 541 U.S. 36 (2004) should be applied retroactively to cases on collateral review. Schriro v. Summerlin, 542 U.S. 348 (2004) governed its analysis. Finding that the rule in Crawford was a "new rule," the court first compared the sentencing scheme in Summerlin with the cross-examination requirement of Crawford to assess whether admission of untested testimonial statements seriously diminishes accuracy of convictions as compared to judicial factfinding in death sentencing. Referencing numerous opinions of this Court and language in Crawford itself, the court found "the evidence that cross-examination decreases the possibility of inaccurate conviction is unequivocal." In contrast, the Ninth Circuit observed, this Court found the evidence of jury versus judge factfinding "too equivocal." JA 127-128.

Noting that accuracy and reliability do not exist in a vacuum, the Ninth Circuit assessed the nature of the change from pre- to post-Crawford Confrontation Clause jurisprudence. The court referred to this Court's description of the pre-Crawford doctrine as a "rare case" of "fundamental failure" and refused to accept the argument that the change was "a mere tweak on the admissibility of hearsay." The court, in examining whether the Crawford rule "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of the proceeding" compared Crawford to Gideon v. Wainwright, 372 U.S. 335 (1963). As a result of this

comparison, the Court recognized that there are few rules which can be considered "bedrock" and determined that Crawford should join the "very limited company" of Gideon.

II.
ARGUMENT

A. SUMMARY OF ARGUMENT

Teague

For the purposes of retroactivity analysis, the rule in Crawford is like the rule in Gideon and very unlike any rule which has been examined by this Court since Teague. The developmental history of the two rules is strikingly similar. Gideon and Crawford both signified a change in course after the Court had taken an aberrational turn and strayed from the old, sounder precedents and the fundamental constitutional principles of the right to assistance of counsel and the right to confront witnesses, respectively. The nature of the change effected by each rule was not incremental but paradigmatic. The right to assistance and appointment of counsel existed in various forms both constitutionally and statutorily well before the rule in Gideon. Gideon replaced a system that depended on varying, subjective determinations as to the need for counsel to a rule requiring appointment of counsel for indigent defendants in all serious criminal cases based upon the fundamental constitutional principles explicit in the Bill of Rights. The right to confrontation of witnesses existed long before the rule in Crawford. Crawford replaced a system characterized by that Court as "inconsistent," "unpredictable," "subjective," and "amorphous" with a rule which returned to the historic constitutional principles carried over from the Common Law and made stronger and more explicit in the Bill of Rights.

AEDPA

The deference provision of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1) does not preclude granting relief on a claim based on a new rule which this Court applies retroactively. Nothing in the text of § 2254 bars granting relief on such a claim. Lack of any clear and specific language in the statute prevents this Court from concluding that Congress intended to eliminate the pre-existing habeas jurisdiction of the federal courts to grant relief on such claims.

The text of § 2254(d)(1), which refers to "clearly established Federal law," must be read in conjunction with the explicit retroactivity provision that Congress included in AEDPA. Once this Court applies a new rule retroactively, that new rule takes the place of the former rule, and thus becomes nunc pro tunc, the "clearly established" rule to which section § 2254(d)(1) refers. That is the only construction of the statute that follows the technical and common sense meaning of "retroactive," and that harmonizes the deference provision of § 2254(d)(1) with the retroactivity provisions in the statute, and thus gives effect to all of its provisions.

B. THE CRAWFORD RULE MUST BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW

The conviction in Mr. Bockting's case became final in 1993. Accordingly, the Court must determine: 1) whether "the Constitution, as interpreted by precedent then existing, compels the rule"–whether the rule is actually "new;" 2) if the rule is new, whether it is nevertheless retroactive because

it falls under one of two exceptions to nonretroactivity. Beard v. Banks, 542 U.S. 406, 411 (2004).

Nevada and its amici contend that the Ninth Circuit reached the wrong result due to errors in analyzing the rule's impact on fairness and accuracy and by applying a "watered down" test for whether the rule qualifies as a "watershed" rule. Nevada argues the Circuit lost its way because it conducted its analysis based upon the benefits of confrontation in general rather than concentrating on the operation of the Crawford rule specifically. Nevada's Brief on the Merits, p. 25. Nevada contends that the rule in Crawford is not based upon any effort to enhance reliability or accuracy but the rule was adopted only to correct a misunderstanding of the Framers' understanding of the Confrontation Clause. See Brief for the United States, p. 19. They add that Crawford's "contribution to accuracy is small" because some reliable evidence will be excluded under the rule and since the Roberts rule incorporated a requirement of reliability, if properly applied, the likelihood of accurate convictions could not be diminished. Finally, Nevada and its amici argue that Crawford cannot be placed in that small number of cases that qualify as "watershed" rules because, 1) unlike Gideon, which does qualify, the right to confrontation existed before Crawford and 2) the rule could not be a "watershed" rule because it is subject to harmless error analysis.

1. Crawford replaced a rule which was "inherently unpredictable" and a "fundamental failure" with a rule which insists that the only permissible test of reliability is observance of the safeguard envisioned by the Framers: cross-examination.

The Circuit Based its Analysis on the Specific Rule in Crawford

Nevada's argument begins with the accusation that the Circuit could not reach the right conclusion because it started in the wrong place. The right place to start, say Nevada and amici, is with the rule implementing the right, not with the right itself. If the discussion, the comparisons and the measurement of change are corrected based on the rule and not the right, Nevada and its amici argue that it will be obvious that the rule did not alter our understanding of the bedrock procedural elements necessary for a fair proceeding. The Circuit did set forth the long history of decisions of this Court describing the confrontation and cross-examination, as essential to "the accuracy of the truth-determining process." The result reached by the Circuit was clearly based upon a comparison of the unreliability, unpredictability and "fundamental failure" of the Roberts system of ad hoc judicial decision-making and the Crawford return to cross-examination as a pre-requisite to fundamental fairness. JA 130-131.

Crawford Created a New Standard for Accuracy

Nevada argues that "hoped-for increased accuracy was not the basis for the decision" in Crawford. Nevada's Brief on the Merits, p. 23. The language in Crawford refutes that contention:

> [T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford v. Washington, 541 U.S. 36, 61 (2004).

> This open examination of witnesses...is much more conducive to the clearing up of truth.

541 U.S. at 61-62, quoting 3 William Blackstone, Commentaries 373.

> Adversarial testing "beats and bolts out the Truth much better."

541 U.S. at 62, quoting Matthew Hale, History and Analysis of the Common Law of England 258 (1713).

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

541 U.S. at 68-69.

> Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure.

541 U.S. at 74 (Rehnquist, C.J., concurring).

Nevada argues that Crawford was less concerned with the risk of unreliability and unfairness in the Roberts rule than with "fidelity to the historically correct constitutional process." Nevada's Brief, p. 24. In fact, the entire thrust of the Crawford decision was to replace a system of unpredictable case-by-case decisions with a rule which insured that accuracy would be tested by the method provided for in the Bill of Rights: confrontation.

Language in the decision itself makes it clear that the intent was to insure both predictability and reliability:

> The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

541 U.S. at 63.

> [T]he Roberts test is inherently, and therefore permanently, unpredictable.

541 U.S. at 69, fn. 10.

> By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design. Vague standards are manipulable...the Framers had an eye toward politically charged cases like Raleigh's-great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.

541 U.S. at 67.

> We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.

541 U.S. at 55.

2. Gideon Replaced an Unpredictable System of Case-by-Case Decisions on the Need for Counsel with a Rule Requiring Adherence to an Explicit Bill of Rights Safeguard

Nevada asserts that no right to counsel in state prosecutions existed before Gideon v. Wainwright, 372 U.S. 335 (1963), was decided, unlike Crawford in which, Nevada asserts, there was an existing rule. Nevada's Brief on the Merits, p. 29. An accurate review of the development of the rule in Gideon with the development of the rule in Crawford reveals remarkable parallels.

Almost thirty years before Gideon was decided, the Court in Palko v. Connecticut, 302 U.S. 319 (1937) recognized that the Sixth Amendment right to counsel had "been found to be implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, become valid as against the states." Id. at 324. The Court based this assertion on Powell v. Alabama, 287 U.S. 45 (1932). Powell established the right to counsel, including the right to appointment of counsel, in any capital case where the defendant is unable to retain counsel and is unable to "make his own defense because of ignorance, feeble-mindedness, illiteracy, or the like." Id. at 71. Before the Court decided Gideon, the right to the

appointment of counsel in all capital trials was clear. Hamilton v. Alabama, 368 U.S. 52 (1961).

In Betts v. Brady, 316 U.S. 455 (1942), the Court was asked to extend the right in Powell beyond capital cases with special circumstances to all criminal cases in state courts. The Court refused to expand the rule, finding that most states had some provision for the appointment of counsel in some category of cases either by statute or court rule[11] and the provisions of the Fourteenth Amendment already provided protections against fundamentally unfair convictions.

So when Gideon was decided, the Court replaced a system of case-by-case decisions on the need for counsel with a safeguard found explicitly in the Bill of Rights—determining that the only proper measure of whether a felony conviction meets the constitutional requirements of fairness, reliability and accuracy is a trial with the assistance of counsel.

The Court in Gideon traced the history of the rule requiring appointment of counsel and characterized its

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[11] See Appendix to the Opinion in Betts v. Brady, id., which sets forth the status of appointment of counsel rules in all states at that time. Justice Black, concurring in the opinion in Betts noted:

> In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases (e.g. where the crime charged is a felony, a 'penitentiary offense,' an offense punishable by imprisonment for several years) be provided with counsel on request....In only two states...has the practice here upheld by this Court been affirmatively sustained.

Id. at 477, fn. 2.

decision in Betts as "an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice." 372 U.S. at 344.

This is precisely what happened in Crawford. The Court found that the rule established in Ohio v. Roberts, 448 U.S. 56 (1980)-- allowing a judge to determine reliability and dispense with confrontation and cross-examination-- was a break from the design of the Framers by "replacing categorical constitutional guarantees with open-ended balancing tests..." 541 U.S. at 67-68.

3. Constitutional Reliability Cannot be Measured by the Roberts Test which was Determined to be Fundamentally Wrong

Nevada and its amici suggest that applying the only constitutional method for determining reliability of testimonial statements may decrease accuracy arguing that possibly reliable hearsay will be excluded because the declarant is not available for cross examination.[12]

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[12] Justice Scalia, dissenting in Maryland v. Craig, 497 U.S. 836 (1990), commented on a similar argument: "To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty." Id. at 867

The first problem with this argument is that it mischaracterizes the constitutional principle of reliability. As used in this Court's cases, particularly Teague v. Lane, 489 U.S. 288 (1989), reliability refers to the product of an adequate constitutional process, that is, a result in which the Court has confidence. See, e.g., Strickland v. Washington, 466 U.S. 668, 693-94 (1984) (ineffective assistance of counsel prejudicial when it "undermines the reliability of the result of the proceedings" or "confidence in the outcome"). In Crawford itself, the Court made it clear that reliability, as used in the sense it is used in Teague, means that the same process of ensuring accuracy is constitutionally adequate:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61.

Thus the reliability inquiry under Teague examines the effect of the new rule on the process of determining reliability, not on its effect on individual bits of evidence. Accepting Nevada's argument on this point would make the test impossible to satisfy. No human system can ensure that only truthful testimony will be admitted and only false testimony excluded: a practiced and persuasive, or delusional liar, may fool a judge and jury no matter how well cross-examined, and a poor witness may not be believed no matter

how truthful he is. Use of all the protections available under the Constitution may result in convictions that are eventually shown not to be worthy of confidence. See, e.g., Banks v. Dretke, 540 U.S. 668, 698 (2004) (Failure to disclose favorable evidence is prejudicial when it puts the "whole case in such a different light as to undermine confidence in the verdict." (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).[13]

This part of Nevada's argument is eviscerated by its concession that the right to counsel rule of Gideon, would qualify as a reliability-enhancing rule under Teague. Nevada's Brief. at p. 26. While the right to counsel does undoubtedly enhance reliability it also results in the exclusion or attacking of prosecution evidence that may be entirely truthful. The point, of course, is that representation by counsel increases the reliability of the proceeding, whatever effect it may have on individual items of evidence. In Crawford itself, this Court indicated the improvement in reliability that the rule would cause by contrasting it with the "unpardonable vice of the Roberts test" which is not merely its unpredictability, but "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Crawford, 541 U.S. at 63. In short, contrary to Nevada's argument, the Crawford rule is entirely directed toward reliability under the Teague standard,

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[13] The report by the Department of Justice on DNA exonerations illustrates this point. In many of the cases in which DNA evidence ultimately exonerated the defendant, there was strong identification evidence and trials in which the constitutional procedures were followed did not disclose the falsity of those identifications. See U.S. Department of Justice, Convicted by Juries Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial 16-17 (1996).

and "goes to the heart of the truthfinding function," Solem v. Stumes, 465 U.S. 638, 645 (1984).

The second problem with this argument is that in order to conduct the analysis that Nevada proffers, the "amorphous," "unpredictable," and "entirely subjective" process, condemned by Crawford, 541 U.S. at 63 must be employed. In Crawford, this court refused to perpetuate the "fundamental failure" of the Roberts rule by engaging in the reliability assessment it had rejected. 541 U.S. at 62. It is apparent that Nevada and its amici simply disagree substantively with the holding in Crawford. The only method for determining the reliability of testimonial statements is confrontation and cross-examination—a comparison based upon reinvocation of a subjective evaluation of reliability is simply not acceptable after Crawford.

4. A Rule Can be Both a Watershed Rule and Subject to Harmless Error Analysis

Nevada and its amici argue that Crawford cannot be a watershed rule if violations of the Confrontation Clause are not structural and are subject to harmless error analysis. Nevada's Brief, p. 29; Brief of Texas, et al., p. 11. Nevada does not offer any analytical support for this point and there is none. Whether a fundamental error is structural depends on whether its effect on the trial can be assessed or not. Whether a fundamental rule should be applied retroactively depends on whether the error affects the reliability of the proceedings. There is nothing "anomalous" about treating these issues differently. See Tyler v. Cain, 533 U.S. 656, 665 (2001).

Crawford error does affect reliability, but the effect on the trial proceedings can be measured by examining the record

and making a traditional assessment of harmlessness, depending upon the centrality of the hearsay in question, the potential effect of adequate cross-examination, and the strength or weakness of the other evidence. That analysis is not possible, or permissible, in the case of a structural error.[14] Similarly, this Court held very recently that refusal to allow a defendant to be represented by counsel of his choice was structural error, because the effect of having other counsel could not be assessed. United States v. Gonzales-Lopez, 126 S.Ct. 2557, 2564-65, n.5 (2006). But in light of the fact that the defendant received effective representation from the appointed counsel, it would be hard to argue that the Gonzalez-Lopez rule affected the reliability of the trial.

5. Gideon, like Crawford changed our understanding of a constitutional right at a conceptual level but did not create a new right

Nevada and its amici argue that the Crawford rule is not a "watershed" rule, i.e., it is not as "fundamentally groundbreaking" as the right to counsel created in Gideon. Nevada's Brief, p. 22. Nevada's argument fails to recognize that what was "groundbreaking" about Gideon was acknowledgment that the assessment of the need for counsel could no longer be dependent upon individual assessments of "special circumstances." The watershed change was Gideon's return to "old precedents" in order to "restore constitutional

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[14] For instance, the improper exclusion of a juror in violation of Batson v. Kentucky, 476 U.S. 79 (1986) is a structural error, because there is no means of assessing prejudice; but when the jury actually impaneled is impartial, the error does not affect the reliability of the proceedings and thus Batson was held not to be retroactive. Allen v. Hardy, 478 U.S. 255, 259 (1986)(per curiam).

principles established to achieve a fair system of justice." 372 U.S. at 344. The "sweeping" change effected by Gideon cannot be found in the number of cases it affected but in the change in the way the constitutional right was understood.

When Gideon was decided, the right to appointment of counsel in capital cases in state courts was clear. Hamilton v. Alabama, 368 U.S. 52 (1961). The "special circumstances" requirement in non-capital proceedings had become so eroded by decisions of this Court that Justice Harlan commented in his concurring opinion in Gideon that "[i]n truth the Betts v. Brady rule is no longer a reality." 372 U.S. at 351. The rule in Gideon, by the time it was decided, affected only non-capital cases in which there were no "special circumstances" and in which the requirements of due process did not already require appointment of counsel. Justice Harlan noted that this Court's decisions prior to Gideon had steadily eroded the "special circumstances" limitation on the right to counsel in all serious cases to the point where the rule was "honored by this Court only with lip service..." (Harlan, J. concurring).

Unlike Gideon, however, before Crawford courts were not applying the sounder, original constitutional principles because Roberts, unlike Betts, continued to be a reality—and "core testimonial statements that the Confrontation Clause plainly meant to exclude" were frequently admitted. See list of illustrative cases. 541 U.S. at 64-65.

Gideon, like Crawford, has limitations. The right to appointment of counsel does not extend to non-felony trials if no term of imprisonment is imposed. Scott v. Illinois, 440 U.S. 367, 373-74 (1979); and it does not apply to discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 610 (1974).

If Gideon is to be the touchstone for determining whether a rule is of watershed stature, we know that whether a rule is a "watershed" rule is not defined by the number of cases actually affected.[15] We know from the history of the rule in Gideon, that a rule can still be of "watershed" status, even if the old rule (Betts) included protections of the fairness of the proceeding. What makes the rule in Crawford like the rule in Gideon is the alteration in the understanding of the fundamental nature of the constitutional right.

6. Crawford, like Gideon, was a return to original constitutional principles

So, too, is Crawford like Gideon in its return to original constitutional principles.[16] The rights codified by the Confrontation Clause had evolved under the common law,[17]

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[15] While the Brief of Texas et al., asserts that retroactive application of Crawford "could imperil countless criminal convictions," Brief of Texas et al., p. 16, a review of forty nine opinions located in state and federal courts actually applying Crawford either on direct appeal or on post-conviction in the Ninth Circuit only five resulted in the granting of relief. See Appendix I.

[16] The decision of the Ninth Circuit could be affirmed on the alternative ground that Crawford is not a new rule under Teague and thus there is no impediment to granting relief. See Concurring Opinion of Judge Noonan in Bockting v. Bayer, 399 F.3d 1010, 1023 (9th Cir. 2005).

[17] The Sixth Amendment went well beyond the historical reach of the common law. At the time of the adoption of the constitution, the common law did not allow representation by counsel in felony cases, nor did it provide for adequate notice of the charges. See generally 4 William Blackstone, Commentaries on

but the common law rule with respect to hearsay (putting aside the very limited common law exceptions not at issue here) was already clear and unequivocal: "A mere hearsay is no evidence." Geoffrey Gilbert, The Law of Evidence 149-150 (1st Amer. ed. 1788), and 152 (1769).[18] The policy of the rule tracked the concerns underlying the constitutional confrontation guarantee:

> It seems agreed, that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath but also because the other side hath no opportunity of a cross examination. . . . .

William Hawkins, A Treatise of the Pleas of the Crown 431 (2nd ed. 1724).[19]

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the Laws of England 318, 349-50 (1769).

[18] No less an authority than Sir Edward Coke derided it as a "strange conceit . . . that one may be an accuser by hearsay. . ." 3 Edward Coke, The Third Part of the Institutes of the Laws of England *25 (1644); Theory of Evidence 111 (1761); The Law of Evidence 148 (1717) ("A hear-say was not to be allowed as a direct evidence"); Giles Duncombe, Tryals Per Pais Appendix, 15 (1702) ("Hearsay or a report of what another man said, is no evidence against a prisoner"); Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius 294 (5th ed. 1785); 12 Charles Viner, A General Abridgment of Law and Equity 118 (2d ed. 1791) ("hearsay from others is not to be applied immediately to the prisoner. . . hearsay was not to be allowed as a direct evidence").

[19] "HEARSAY, is generally not to be admitted as evidence; for no evidence is to be allowed but what is upon oath; for if the first speech was without oath, another

The new United States recognized the same principles, an early manual for justices of the peace affirmed the "general rule that hearsay is no evidence ," William Hening, The New Virginia Justice 279 (1825),[20] and early American cases followed this principle routinely.[21]

> oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice, and, besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit."

1 John Burn, A New Law Dictionary 421 (1792); see also Thomas Peake, A Compendium of The Law of Evidence 8 (Phila. 1802).

[20] An earlier edition of Hening's manual criticized the Marian deposition procedure as "liable to these objections;-that the prisoner may be concluded by evidence however objectionable the witness may be in point of interest, guilt, and that the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel." William Hening, The New Virginia Justice 148 (1795). In a later edition, Hening noted that the statutory basis for conducting and admitting depositions under the Marian statutes "is not recognized in Virginia." William Hening, The New Virginia Justice, 785 (1825), citing 4 St. George Tucker, Blackstone's Commentaries 296 n.1. (1803); see also The New-Hampshire Justice of The Peace 163 (1824) ("hearsay is not evidence. It is a general rule that if any fact is to be substantiated against a person, it ought to be proved by the testimony of a witness sworn to speak the truth.).

[21] Both criminal and civil cases affirm the general prohibition on admitting hearsay. Mackaboy v. Comm., 4 Va. 268 (1821) (taking of inquisition as basis of conviction violated defendant's

In Mr. Bockting's case, there can be no dispute that the critical evidence against him was rank hearsay,[22] that would have been inadmissible under the law in effect at the time of

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state right to confrontation, even though he was present and allowed to speak at inquisition) Comm. v. Chabbock, 1 Mass. 144 (1804) (statement from third party supposedly admitting to commission of offense excluded as hearsay); State v. Webb, 2 NC 103 (1794) (depositions must be taken in defendant's presence to be admissible at trial because "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."); Respublica v. Langcake, 1 Yeates 415 (Pa. 1795) (declarations of dead co-defendant inadmissible by other defendants as hearsay). Perine v. Van Note, 4 N.J.L. 146 (1818) (re-examination of witnesses by jury in absence of parties requires reversal. "No man can be condemned in our law without hearing the witnesses against him, or having an opportunity to hear them, and to cross-examine them"); Bartlet v. Delprat, 4 Mass. 702 (1808); Bridge v. Eggleston, 14 Mass. 245, 251 (1817) (hearsay "is never received as evidence"); Penner v. Cooper, 18 Va. 458, 1815 (1815) (hearsay admission by third party not admissible to exculpate defendant in civil case); Nettles v. Harrison, 13 S.C.L. 230 (1822) ("that hearsay shall not be received as evidence, is so well established, that it would be an imputation on anyone, pretending to be conversant with the law, to say that he did not know it".); Wilson v. Boerem, 15 Johns. 286 (N.Y. Sup. 1818); Longenecker v. Hyde, 6 Binn. 1, 2 (1813) (third party's hearsay statement that he received merchandise not admissible since "defendant had a right to the oath of [the declarant] and the opportunity of cross-examining him in public").

[22] Laura Bockting's testimony, purporting to relay Autumn's supposed statements to her, was equally inadmissable hearsay, but the court of appeals did not address that testimony in its decision, finding that relief should be granted based solely upon the prejudicial admission of the testimonial hearsay of the detective.

the adoption of the Constitution. An English case decided shortly after the adoption of the Constitution demonstrates how Mr. Bockting's case would have been resolved under the common law in effect then, even without the explicit constitutional confrontation guarantee. In King v. Brasier, 1 Leach 199, 168 Eng. Rpts. 2002 (K.B. 1779), the common law judges had decided that if a child could not understand the oath, and thus could not be sworn, the child's information was not admissible. Thomas Leach, Cases in Crown Law Determined by the Twelve Judges 346 (1789). Later, in King v. Tucker (1808), a judge on assizes tried the defendant for an offense against a child. "The child who appeared to be about 5 years old was produced but seemed to have no idea of the nature of an oath; nor indeed could she be prevailed on in court to answer any question that was put to her." D.R. Bentley, ed., Select Cases from The Twelve Judges' Notebooks 102 (1997). The court accordingly allowed the child's mother to recount the child's statements to her, and the defendant was convicted. The court stated that "[w]hen the child's mother was examined I doubted whether I ought to receive her account of the information she had from the child," and reserved the legal question for review by the twelve judges, whose answer was laconic but clear: "conviction wrong." Id. at 105.

7. While Crawford is Like Gideon, it is Unlike Any Case in Recent Constitutional Jurisprudence

The analysis of the nature of the right under discussion in Crawford begins with a declaration that the right to confrontation is a "bedrock procedural guarantee." 541 U.S. at 42. This language is found in the earliest discussions of retroactivity principles. Teague, 489 U.S. at 311-12 quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971). The

decision proceeds, then, to lay out a completely new way of looking at the constitutional principles involved. Unlike any of the other new rules examined under the Teague standard, Crawford did not merely "renegotiate[] the contours of an existing right" as suggested by Nevada. Nevada's Brief on the Merits, p. 40. Rather, as recognized by the dissenting opinion, Crawford represents a "change of course," 541 U.S. at 76, (Rehnquist, C.J.) not a mere "incremental change." Beard v. Banks, 542 U.S. 406, 419.

Crawford, unlike all of the retroactivity cases decided since Teague, recognized the "fundamental failure" of the Roberts rule and went about demonstrating, with meticulous historical references, how the entire approach of the Court since Roberts, was a departure from historical, constitutional principles and was just dead wrong. Applying Crawford to Mr. Bockting's case is consistent with the principles underlying the presumption of nonretroactivity. Crawford makes clear that a conviction based upon testimonial hearsay, where there has been no opportunity for cross-examination, has always been wrong.

The Brief of the CJLF calls the second Teague exception "a historical relic" which should be permanently shelved. The CJLF suggests that there simply are no more Gideon-like rules to be made. Brief of CJLF, p.13. Justice Scalia, dissenting in Maryland v. Craig, 497 U.S. 836 (1990), envisioned a repulsive scenario which would be permitted under the holding in that case:

> A father whose young daughter has been given over to the exclusive custody of his estranged wife...is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered

> without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I-your father...whom you see before you did these terrible things?

Id., at 861, (Scalia, J., dissenting).

The dissent was referring to the risks resulting from permitting a child witness to testify by closed-circuit television. In Mr. Bockting's case, the child did not testify at all. When Autumn did sit in the presence of her stepfather, before months had passed in the exclusive custody of her mother, she told a completely different story than that related to the jury by the detective. The conviction in this case, secured as it was on untested testimonial hearsay, proves that there are still rules that require correction.

C. THE CURRENT HABEAS CORPUS STATUTE INCORPORATES THE RETROACTIVITY STANDARDS OF TEAGUE v. LANE, AND THEREFORE PERMITS GRANTING RELIEF ON THE BASIS OF A NEW RULE THAT THIS COURT APPLIES RETROACTIVELY

As shown above, this Court must apply the "new rule" of Crawford retroactively, and it must therefore affirm the decision of the court below granting relief to Mr. Bockting. The decision of the Nevada Supreme Court rejecting Mr. Bockting's confrontation clause claim is "contrary to" the federal law which this Court's decision here will have

"clearly established" retroactively. 28 U.S.C. § 2254(d)(1).[23] AEDPA explicitly provides for filing and consideration of habeas corpus petitions based on new rules applied on collateral review by this Court, and nowhere does it expressly or impliedly prohibit granting relief on the basis of such rules under 28 U.S.C. § 2254(d)(1) . Accordingly, AEDPA authorizes granting relief to Mr. Bockting on the basis of the Crawford rule, even though the rule it imposes is a new one.

1. The Text of § 2254(d)(1) Does Not Preclude Granting Relief on the Basis of a New Rule Made Retroactive by this Court

The section stating the substantive standard of review in habeas corpus cases, 28 U.S.C. § 2254(d), was amended by AEDPA to provide:

> An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

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[23] Mr. Bockting's habeas corpus petition was filed after the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and the provisions of the habeas corpus statute amended by AEDPA therefore apply to his case. E.g., Lindh v. Murphy, 521 U.S. 320, 329-30 (1997).

This provision was intended to do two things: to require federal courts to defer to the state court decisions on habeas issues, and to make the decisions of this Court the sole means of making a rule "clearly established Federal law." Williams (Terry) v. Taylor, 529 U.S. at 362, 407-13 (2000); Tyler v. Cain, 533 U.S. 656, 663-64 (2001). The plain language of this section does not expressly provide that a court has no power to grant relief on the basis of a new claim that is applied retroactively under Teague.

In fact, the term "clearly established Federal law" in this section is easily read in harmony with the retroactivity provisions of AEDPA to allow granting relief, in light of the definition of retroactivity. Retroactive means "having relation or reference to or efficacy in a prior time. . . ." Webster's Third New International Dictionary 1940 s.v. retroactive (1993)(emphasis supplied); id., s.v. retroactive law ("a law that. . . . in any way expressly affects an act done prior to the passing of the law. . . ."); Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); see Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). Once this Court has "made [a new rule] retroactive to cases on collateral review," see 28 U.S.C. § 2244(b)(2)(A), it makes that rule "clearly established"; and the only way such a decision can be given "efficacy in a prior time" is to deem the rule "clearly established" as of the time of the state court decision. In essence, the retroactivity ruling invalidates the previous "clearly established" law and replaces it with the new rule.[24] This interpretation does no violence to

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[24] An order nunc pro tunc has "retroactive legal effect," Black's Law Dictionary 1097 (7th ed. 1999), as of the earlier date.

the text of § 2254(d)(1), which does not contain any temporal language, and it harmonizes the deference provision of that section with the retroactivity provisions Congress included in the same statute.

Nevada and its amici contend, however, that the "clearly established Federal law" language of § 2254(d)(1) can refer only to the law in effect at the time of the state court decision, and that therefore the section totally prohibits granting habeas relief on the basis of a new rule that this Court has "made retroactive to cases on collateral review." See 28 U.S.C. § 2244(b)(2)(A). To prevail on this argument, Nevada must bear the burden of showing that Congress intended to eliminate the existing power of federal courts to grant relief on the basis of new rules solely by implication, without any mention of the issue in §2254(d)(1). Repeals by implication, however, are strongly disfavored: "absent 'a clearly expressed congressional intention,' 'repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality)(citations omitted); Lockhart v. United States, 126 S.Ct. 699, 703 (2005)(Scalia, J., concurring). This principle is at its strongest when the argument is that Congress repealed habeas corpus jurisdiction by implication, since in that situation "Congress must articulate specific and unambiguous directives to effect a repeal." I.N.S. v. St. Cyr, 533 U.S. 289, 298-99 (2001).

A decision by this Court that a rule applies retroactively in collateral proceedings does essentially the same thing as a nunc pro tunc order.

Nevada has not remotely sustained this burden. Nevada's argument is based on language that simply is not in the statute: Nevada relies solely on language in this Court's decision in Lockyer v. Andrade, 538 U.S. 63 (2003), where this Court stated that "clearly established" law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Id. at 71 (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)). The Andrade Court continued, "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle set forth by the Supreme Court at the time the state court renders its decision." Id. at 71-72. From this language, Nevada argues that relief can never be granted on the basis of a retroactive "new rule." Nevada's Brief, p. 43-46. The statute itself, however, does not contain the language "as of the time of the relevant state court decision" that the state would read into it.[25] In the routine habeas case, of course, which does not involve retroactive application of a new rule, the state of "clearly established Federal law" will be assessed "as of the time of the relevant state-court decision;" but the statute does not include any such limiting language that might suggest that the section had any intended effect on situations that do involve retroactivity.[26] Even in an enactment which this

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[25] Since no question of the retroactivity provisions of AEDPA was presented in those cases, the language in Andrade and Williams is dictum with respect to the interpretation of § 2254(d)(1) in cases involving retroactive application of a new constitutional rule. It therefore cannot control the result in this case. See e.g., Williams v. Taylor, 529 U.S. at 412 (only holding rather than dicta has precedential effect).

[26] The fact that the phrase "resulted in a decision that was contrary to . . . clearly established Federal law," § 2254(d)(1) is in the past tense does not suggest that Congress intended to abolish

Court has indicated is not a "silk purse of the art of statutory drafting," Lindh v. Murphy, 521 U.S. 320, 336 (1997), it is not reasonable to infer that Congress intended to abrogate this Court's entire retroactivity jurisprudence without saying a single specific word on the subject; and any such conclusion would be directly contrary to St. Cyr.

2. Section 2254(d)(1) Must be Read in the Context of the Entire Statute, Including the Specific Provisions Codifying Teague and Permitting Application of New Rules in Habeas Proceedings

Neither the text of § 2254(d)(1), nor anything in Nevada's argument, remotely supports its position that the section by implication repeals the entire body of retroactivity jurisprudence that this Court has evolved, including the rules of Teague and Griffith v. Kentucky, 479 U.S. 314 (1987).[27]

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any possibility of relief on new claims under pre-existing law. A state court decision on a constitutional claim will always come before the federal court decision that reviews it, and it was simple common sense that the state decision would be referred to in the past tense.

[27] Nevada's interpretation of § 2254(d)(1) would abrogate, also only by implication, the long-standing and universally accepted rule of Griffith v. Kentucky, 479 U.S. 314 (1987), that a new rule of constitutional law must be applied to cases not yet final on direct appeal. If a state court rejects a constitutional claim, but this Court enunciates a contrary rule after the state decision but before the date of finality under Teague v. Lane, see Clay v. United States, 537 U.S. 522, 527 (2003), the position of Nevada and its amici would prevent granting relief under § 2254(d)(1), because the new rule was not "clearly established" at the time of the state decision. There is nothing in the structure of AEDPA, or in any principle of

Nevada's argument that that was the intent of Congress is even more untenable in light of Congress' inclusion of explicit retroactivity provisions in AEDPA. See below. Since there is no clear language in § 2254(d)(1) that precludes granting relief on a "new rule" claim, this Court must engage in the "holistic endeavor" of statutory construction, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004), and attempt to find a construction of the statute that harmonizes and gives effect to all its parts. E.g., Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998) (refusing to adopt interpretation leading to "far reaching and seemingly perverse" results); United States v. Granderson, 511 U.S. 39, 47 n.5 (1994); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). Analysis of the effect of § 2254(d)(1) must therefore take into account the provisions of AEDPA that expressly refer to filing and considering petitions based on retroactive application of new rules by this Court. 28 U.S.C. §§ 2244(b)(2) (exception to second or successive petition rule), 2244(d)(1) (exception to statute of limitations), 2254(e)(2) (exception to bar on evidentiary hearing), 2264(a) (exception to restriction of claims to those presented in state court).[28] These provisions incorporate language drawn from this Court's decision in Teague v. Lane, 489 U.S. 288 (1989), and there can be no reasonable dispute that the language in these sections was intended to refer to the Teague retroactivity

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statutory construction, that remotely suggests that Congress intended, entirely by implication, to upset the well-established rule of Griffith.

[28] Respondent Bockting refers to these parts of the statute in this brief as the retroactivity provisions, and they are printed in Appendix II to this brief.

standard.[29] In fact, the legislative history shows that preserving the retroactivity principle enshrined in Teague was actually considered by the chief proponent of the bill. See 141 Cong. Rec. S7478-03 (May 25, 1995)(statement of Senator Hatch).

By incorporating language describing the Teague standards in AEDPA, Congress clearly intended to validate this Court's work in laboriously evolving its

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[29] The terms used in the statute's retroactivity provisions mirror the language of the Teague cases. The term "new rule of constitutional law" is taken directly from the language of Teague itself, See 489 U.S. at 299-306, 310, quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring); see also Caspari v. Bohlen, 510 U.S. 383, 388-389, 397 (1994); Graham v. Collins, 506 U.S. 461, 463, 466 (1993). The term "applied retroactively" also comes directly from the analysis in Teague.489 U.S. at 294-96, 299-301, 303-305, 307, 316; see also Sawyer v. Whitley, 505 U.S. 333, 337 n.4 (1992). The phrase "applied retroactively to cases on collateral review," 28 U.S.C. § 2244 (d)(1), also comes directly from Teague, 489 U.S. at 294-295, 299, 302. Phrases combining the Teague terms "new rule" and "applied retroactively" appeared routinely in this Court's discussions of Teague, before the enactment of AEDPA. See, e.g., Powell v. Nevada, 511 U.S. 79, 84 (1994); Collins v. Youngblood, 497 U.S. 37, 40-41 (1990); Butler v. McKellar, 494 U.S. 407, 415 (1990); Penry v. Lynaugh, 492 U.S. 302, 329 (1989) overruled on other grounds Atkins v. Virginia, 536 U.S. 304 (2002); Withrow v. Williams, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring and dissenting). Congress is presumed to have used these terms to describe the pre-existing scheme of Teague, in the absence of any indication that it intended to change existing law. See, e.g., Lorillard v. Pons, 434 U.S. 575, 581-82 (1978); cf., Williams v. Taylor, 529 U.S. at 403-06 (new language in statute evidences intent to change law).

retroactivity jurisprudence, culminating in Griffith and Teague, and to adopt it as part of AEDPA, with the clarification that only this Court's decisions could make Federal law "clearly established" - - a clarification that Congress made by including specific language in § 2254(d)(1). See Williams (Terry) v. Taylor, 529 at 412.[30]

There is no theory that can rationally reconcile the presence of four provisions in AEDPA incorporating the language of Teague, and specifically directed to consideration of habeas petitions based on retroactively-applied new rules, with Nevada's argument that § 2254(d)(1) prohibits any consideration of claims based on new rules. This Court cannot impute to Congress an intent to erect a system for litigating petitions based on new rules that is simply futile; and nothing in the text of AEDPA approaches the level of specificity required under St. Cyr for limiting the existing habeas jurisdiction of federal courts that Nevada seeks. Accordingly, this Court should reject Nevada's argument and affirm the decision of the Court of Appeals.

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[30] This Court has continued to recognize the vitality of Teague: it has applied Teague principles of retroactivity in AEDPA cases, without suggesting that § 2254(d)(1) would preclude granting relief on a claim based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2244(b)(2)(A), Beard v. Banks, 542 U.S. 406 (2004); Horn v. Banks, 536 U.S. 266, 272 (2002), and it seems clear that Teague "remains the law." See Williams v. Taylor, 529 U.S. at 379(Stevens, J.). It seems highly unlikely that this Court would have devoted its resources to analyzing the Teague issue in those cases as purely a sterile exercise, if, at the end of the day, granting relief was absolutely precluded by § 2254(d).

3. The Examples Cited by Amici for Nevada of Situations in which the Retroactivity Provisions may not be Surplusage does not Alter the Statutory Construction Analysis Harmonizing § 2254(d)(1) with the Teague Provisions

Although Nevada's brief does not address the effect of the retroactivity provisions on the statutory construction analysis,[31] the briefs of amici curiae (the Criminal Justice Legal Foundation and numerous states) make a variety of ingenious but insubstantial arguments in an effort to show that Nevada's interpretation of § 2254 (d)(1) would not render the AEDPA retroactivity provisions "insignificant," Duncan v. Walker, 533 U.S. 167, 174 (2001). Mr. Bockting submits that this Court need not reach these issues in light of the argument presented above, which harmonizes the retroactivity provisions, in their plain meaning with § 2254(d)(1). The retroactivity provisions may have some vitality is not determinative: in which in any event, the amici's arguments are misdirected.

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[31] The Court of Appeals cases holding that § 2254(d) precludes finding that a new rule can be a ground for relief do not offer any statutory construction analysis of the "clearly established" language of § 2254(b), other than stating that it is the "natural" reading of the statute, and do not address the retroactivity provisions of AEDPA at all. Murillo v. Frank, 402 F.3d 786, 789 (7th Cir. 2005); Vasquez v. Stack, 228 F.3d 143, 148 (2d Cir. 2000); Ramdass v. Angelone, 187 F.3d 396, 406 (4th Cir. 1999); Gosier v. Wellborn, 175 F.3d 504, 510 (7th Cir. 1999)("§ 2254(d)(1) means that only rules articulated by the Supreme Court of the United States before the state court rendered its decision may be applied on collateral review." (emphasis in original)); Green v. French, 143 F.3d 865, 873-74 (4th Cir. 1998).

The argument of the amici States in fact supports Mr. Bockting's position that § 2254(d)(1) does authorize granting relief on a new retroactive rule under Teague. The Amici posit a situation in which this Court issues a decision applying a new rule retroactively, and, on the basis of that decision, a petitioner could obtain an evidentiary hearing to develop his claims under the "new rule" provision of § 2254(e)(A)(i). States' Brief, p. 23-24 n.11. The States argue that this scenario shows that § 2254(e)(A)(i) is not mere surplusage as a result of its interpretation of § 2254(d), because at the point that the petitioner sought the evidentiary hearing, the new rule would be "clearly established" by this Court's having "made" the rule retroactive. States' Brief, p. 24 n.11. But that argument assumes that the term "clearly established" in § 2254(d)(1) could mean "established" at the time the federal court granted the evidentiary hearing, not solely at the time of the state court decision on the claim.

The argument implicitly concedes that Nevada's position--that the "clearly established" language of § 2254(d)(1) refers exclusively to the law "at the time of the relevant state-court decision," Nevada's Brief, p.45 (quoting Andrade, 538 U.S. at 71-72) is wrong, because amici argue that the law could be "clearly established" during the federal habeas proceedings. The amici States' argument thus supports Mr. Bockting's position in two ways: first, it suggests that the relevant time period for assessing when the law is "clearly established" is not limited by the text of § 2254(d)(1) to the time of the initial state court decision. If it is conceded that the "clearly established" point is movable, as a result of this Court's decision making the new rule retroactive, then it is far more plausible to conclude that the retroactive application reaches back to the point of the state court decision, which is precisely what the "retroactive" rule is supposed to change. Second, if the amici States argue that the retroactivity ruling changes the

"clearly established" point only to the time of this Court's ruling itself, and does not affect the pre-existing state court ruling, then it would make the retroactivity provisions clearly surplusage: under the States' scenario, this Court could make a new rule retroactive; the federal district court could grant an evidentiary hearing under § 2254(e)(A)(i) based on the new rule; but when it came to adjudicating the claim, the court could not grant relief under § 2254(d)(1) because the new rule was still not "clearly established" at the time of the state court decision. The argument of the Amici States provides no support for a reading of § 2254(d)(1) that essentially reads the retroactivity provisions out of the statute.

Amicus CJLF argues that the retroactivity provisions would not be rendered superfluous by its interpretation of § 2254(d) on the theory that the deference provision does not apply when there is no "relevant state-court decision" (such as when a state court rejects a claim on the basis of an inadequate procedural ruling, or simply does not address a claim); and that, in those situations the retroactivity provisions would retain some vitality despite § 2254(d)(1). CJLF Brief, p. 16-17. But this asserted distinction is illusory: in recognition of the policy behind the § 2254(d)(1) deference provision, most courts of appeals that have addressed the issue have held that, when there is no "relevant state-court decision" to which to defer, the federal court must review this Court's precedents and make an assessment of what an objectively reasonable disposition of the petitioner's claim would have been at the time of the state court decision.[32]

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[32] See Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001)("while we are not required to defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state

Under this caselaw, even in the scenario posited by CJLF, relief could never be granted because the controlling law at the time of the state decision would still be the old law, not the "new rule made applicable to cases on collateral review" which replaced it. CJLF's argument would make the availability of relief depend on whether the state court did or did not decide the claim. Whether the state court resolves a claim on the merits, or rejects it on an inadequate procedural ground, or simply fails to address it, has no rational relationship to whether federal relief should be available. See Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (per curiam)(where habeas petitioner fairly presented constitutional claim to highest state court, court's refusal to address it does not render claim unexhausted so as to make federal review unavailable). The text of § 2254(d)(1) requires the federal court to examine the state court decision to determine substantively whether it is sufficiently reasonable that the federal court must defer to it; but it does not suggest that the availability of any federal review depends on whether the state court did or did not decide a claim that later becomes the subject of a retroactive new rule.

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court's resolution of the case constituted an unreasonable application of clearly established federal law") overruled on other grounds by Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003); Sellan v. Kuhlman, 261 F.3d 303, 311-313 (2d Cir. 2001); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999); Bell v. Jarvis, 236 F.3d 149, 158-59 (4th Cir. 2000)(en banc); Weeks v. Angelone, 176 F.3d 249, 259-60 (4th Cir. 1999)(where state courts rejected claim without stating reasons, federal court must still examine result for unreasonableness under § 2254(d)), affirmed 528 U.S. 225 (2000) (citing standard of deference under § 2254(d)); cf., Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001); Mercadel v. Cain, 179 F.3d 271, 274-75 (5th Cir. 1999)(per curiam)(dictum).

CJLF also argues that the retroactivity provisions would retain vitality if, following the denial of a first federal petition, this Court decided to apply a new rule retroactively, and a petitioner then filed a successive state habeas petition and obtained a state ruling on the merits. If the petitioner then sought to file a successive federal petition,[33] he would need the retroactivity provisions of § 2244(b)(2)(A) and 2244(d)(1)(C) to allow him to file, but § 2254(d)(1) would then allow review of the state court decision, because this Court's decision would have made the new rule "clearly established" at the time of the state decision. CJLF Brief, p. 19-20.

This interpretation would assume a congressional intent to erect a system that would apparently afford relief for new rule claims under § 2254(d)(1) to successive habeas petitioners but not to first habeas petitioners like Mr. Bockting. Mr. Bockting did what this Court's habeas decisions are supposed to encourage: he exhausted his Confrontation Clause claim by raising it throughout the state proceedings, and the Nevada Supreme Court decided the issue against him. According to CJLF, his reward for complying with this Court's exhaustion precedents and obtaining a ruling on the merits, see O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999); Slack v. McDaniel, 529 U.S. 473, 488-89 (2000); Rose v. Lundy, 455 U.S. 509, 520 (1982), is that he cannot obtain relief under § 2254(d)(1) for the violation of Crawford, because the state decision pre-dated any decision to apply Crawford retroactively. If, on the other hand, Mr. Bockting had not raised the claim in the state proceedings at all, and thus there was no state court decision on the issue, he could

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[33] It is assumed he could do so with a year of the substantive decision. See cf. Dodd v. United States, 545 U.S. 353 (2005).

litigate the claim in a successive petition (assuming that no other procedural bars existed). See CJLF Brief, p. 19. Given the importance of exhaustion to the principles of comity and federalism, it is absurd to believe that Congress intended to favor successive habeas petitions over first ones in that manner. See Lonchar v. Thomas, 517 U.S. 314, 324-25 (1996). Essentially, CJLF's argument on this point would divorce the language of § 2254(d)(1) from its role in defining the substantive rule of deference and make it an extraordinarily clumsy means of requiring re-exhaustion following the announcement that a new rule applies retroactively. See Picard v. O'Connor, 404 U.S. 270, 276 (1971). There is nothing in the text of any part of the statute that suggests that this is what Congress intended.

Despite CJLF's creativity, the fact remains that, as a practical matter, interpreting § 2254(d)(1) to bar granting relief on a claim based on a new rule would render the retroactivity provisions "insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001). CJLF in fact admits that its interpretation of § 2254(d) could lead to a situation in which a new rule of law placing a defendant categorically outside liability for a particular punishment under the first Teague exception (as in Atkins); but if the state courts, for whatever reason, refuse to afford relief the federal courts would be powerless to act. CJLF Brief p. 21-22. However Congress intended to restrict habeas review, it is absurd to believe that it intended such a result.[34]

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[34] CJLF argues that no state court, in the sample of decisions it surveyed, has declined to review claims based on the first Teague exception, and that therefore this possibility should not affect this Court's analysis of the issue. AEDPA explicitly contemplates that state courts may act "contrary to" the controlling federal constitutional law, or make an "unreasonable application"of

Fundamentally the arguments of Amici in support of the state seek to impute to Congress an intent not only to jettison this Court's laboriously-developed retroactivity jurisprudence but to interpret the retroactivity provisions in a manner so Procrustean that they would amount merely to complication for complications's sake. Mr. Bockting, by contrast, has proposed a reading of § 2254(d)(1) that is consistent with its text, consistent with the principles of Teague, harmonious with the statute as a whole, and consistent with the plain meaning of "retroactive": once this Court finds that a new rule satisfies Teague, its decision that the new rule is retroactive places the new rule, nunc pro tunc, in the place of the former "clearly established" law, and thus forms the basis for relief under § 2254 (d)(1). Mr. Bockting submits that this Court should adopt that simple construction of the statute, and hold that § 2254(d)(1) authorizes granting relief on the basis of a new rule that has been made retroactive.

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that law to the facts of the case, § 2254(d). CJLF's argument that Congress should have assumed that state courts will always act reasonably without federal review, in interpreting a statute that specifically to provide federal review for the purpose of preventing state courts from acting unreasonably, is incomprehensible.

III.
CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

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APPENDIX I

A.

Court did not grant relief or the court concluded it would not grant relief even if Crawford applied retroactively because the contested evidence was not testimonial:

Brigance v. Knowles, No. CIVS-03-0963-GEB-CMK, 2006 WL 2522401, at *5 (E.D. Cal.) (Aug. 30, 2006) Moen v. Czerniak, No. CV-02-10-JE, 2006 WL 2270879, at *10 (D.Or. Aug. 8, 2006); Jensen v. Pliler, 439 F.3d 1086, 1090 (9th Cir. 2006); Graves v. Yates, No. CIVS032607GEBGGHP, 2005 WL 3031133, at *4 (E.D.Cal. July 1, 2005); King v. U.S., No. 05-0545-CV-W-SOW, 2006 WL 741904, at *6 (W.D. Mo. March 20, 2006); Ferguson v. Roper, 400 F.3d 635, 639 (8th Cir. 2005); Coy v. Renico, 414 F. Supp. 2d 744, 773 (E.D. Mich. 2006); Eldridge v. Director, TDCJ-CID, No. Civ.A. 6:05CV435, 2006 WL 573924, at *5 (E.D. Tex. Feb. 8, 2006); Summers v. Dretke, 431 F.3d 861, 877 (5th Cir. 2005); Qualls v. Russo, ___F. Supp. 2d___, 2006 WL 2357019, at *4 (D. Mass Aug. 1, 2006); Tracy v. Olson, 400 F. Supp. 2d 393, 402 (D. Mass 2005); People v. Sharp, ___P.3d___, 2005 WL 2877807, at *6 (Colo. Ct. App. 2005); McDonald v. Commonwealth, No. 2004-CA-002168, 2006 WL 891110, at *4 (Ky. Ct. App. 2006); Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at * 9 (Mass. Super. Ct. 2005); People v. Walker, 697 N.W.2d 159, 163 (Mich. Ct. App. 2005); State v. Carter, 114 P.3d 1001, 1007 (Mont. 2005); People v. Bradley, 799 N.Y.S.2d 472, 480 (N.Y. App. Div. 2005); In re D.L., No. 84643, 2005 WL 1119809 (Ohio Ct. App. 2005); Commonwealth v. Eichele, 66 Pa. D. & C.4th 460, 469 (Pa. Commw. Ct. 2004); State v. Feliciano, ___A.2d___, 2006

WL 1932661, at *8 (R.I. 2006); State v. Hemphill, 707 N.W.2d 313, 316 (Wis. Ct. App. 2005).

B.

Court did not grant relief or the court concluded that it would not grant relief even if Crawford applied retroactively because the error was harmless:

Clemens v. Shasta County Sheriff, No. S-03-1006 LKKCMKP, 2006 WL 2458712, at *4 (E.D. Cal. Aug. 22, 2006); Cook v. McGrath, No. C03-2719JSW(PR), 2006 WL 2479111, at *7 (N.D. Cal. Aug. 28, 2006); Lee v. Lamarque, No. CVF03-6855 AWI WMW HC, 2006 WL 2223876, at *4 (E.D. Cal. Aug. 2, 2006); U.S. v. Ramirez, No. 97-CR-60012-6-HO, 2006 WL 1788206, at *1 (D. Or. June 23, 2006); Villareal v. Alameida, No. 04-57202, 2006 WL 1627354, at *1 (9th Cir. 2006); German v. Lamarque, No. C 02-1647 SBA, 2005 WL 1926625, at *12 (N.D. Cal. Aug. 10, 2005); Kopp v. Hill, No. 03-222-MA, 2005 WL 1389062, at *6 (D. Or. June 7, 2005); Reedus v. Stegall, No. Civ.A. 00CV73585DT, 2005 WL 1630103, at *1 (E.D. Mich. July 11, 2005); Kamara v. U.S., No. 04 Civ. 5340RMBJCF, 2005 WL 1337396, at *3 (S.D.N.Y. June 6, 2005); U.S. v. Reifler, 446 F.3d 65, 87 (2nd Cir. 2006); Daniels v. Ortiz, No. 05-1924, 2006 WL 2465416, at *12 (D. N.J. Aug. 22, 2006); T.P. v. State, 911 So.2d 1117; (Ala. Crim. App. 2004); People v. Purcell, 846 N.E.2d 203, 215 (Ill. App. Ct. 2006); Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at * 9 (Mass. Super. Ct. 2005); Bynum v. State, 929 So.2d 312, 315 (Miss. 2006); State v. Gomez, 163 S.W.3d 632, 648 (Tenn. 2005).

C.

Court did not grant relief or the court concluded that it would not grant relief even if Crawford applied retroactively because the petitioner had a prior opportunity to cross-examine the declarant:

Salas v. Lamarque, No. 04-55861, 2006 WL 2535224, at *1 (9th Cir. 2006); Mouton v. Runnels, No. C03-5691JF(PR), 2006 WL 1343679, at *15 (N.D. Cal. May 17, 2006); Schunn v. Schriro, No. CV04-1905PHXNWVMS, 2006 WL 571630, at *9 (D. Ariz. March 7, 2006); Hassinger v. Adams, No. C05-01011WHA, 2006 WL 294798, at *3 (N.D. Cal. Feb. 7, 2006); Greene v. Runnels, No.C03-1361JF(PR), 2005 WL 3481476, at *14 (N.D. Cal. Dec. 19, 2005); Huckabee v. Adams, No. CIVS011795DFLCMKP, 2005 WL 3470670, at *5 (E.D. Cal. Dec. 14, 2005); McGee v. Knowles, No. C02-2661, 2005 WL 2171834, at *11 (N.D. Cal. Sept. 6, 2005); Lewis v. Woodford, No. S-02-0013, 2005 WL 2643172, at *8 (E.D. Cal. July 12, 2005); Williams v. Uchtman, No. 04C5019, 2006 WL 931704, at *5 (N.D. Ill. April 5, 2006); Corona v. State, 929 So.2d 588, 595 (Fla. Dist. Ct. App. 2006).

D.

Crawford Applied and relief granted:

U.S. v. Ramirez, No. 97-CR-60012-6-HO, 2006 WL 1788206, at * 1 (D. Oregon, June 23, 2006) Miller v. Fleming, No.C04-1289P, 2006 WL 435466, at *10 (W.D. Washington, Feb. 21, 2006); U.S. v. Peth, No. C04-2305RSM, 2006 WL 278560, at *2 (W.D. Washington, Feb. 2, 2006); Zamora v. Adams, No. 03-57074, 2005 WL 2271723, at *2 (9th Cir., Sept. 19, 2005); Gonzalez v. Hamlet, No. CV-F-03-5695RECDLBHC, 2005 WL 1828529, at *14 (E.D. Cal., July 25, 2005).

APPENDIX II

Retroactivity Provisions in AEDPA

28 U.S.C. § 2244 (b)(2) provides, in pertinent part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless–
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

28 U.S.C. § 2244 (d)(1) provides, in pertinent part:

> A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of–
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, of the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. . . .

28 U.S.C. § 2254 (e)(2) provides, in pertinent part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

28 U.S.C. § 2264 (a) provides, in pertinent part:

> Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable . . . .

See also 28 U.S.C. § 2255 ¶¶ 6, 8.

(14)

No. 05-595

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In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

Respondent Bockting argues in his Merits Brief that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), should apply retroactively to cases on collateral review under the standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989). This argument is premised on two points. First, Bockting asserts that *Crawford* increases accuracy in criminal proceedings because it replaced an unpredictable rule with one that addresses the issue of reliability in the manner envisioned by the framers. Second, Bockting argues that *Crawford* is like *Gideon v. Wainwright*, 372 U.S. 335 (1963), in several particular ways. This Court has held that *Gideon* exemplifies a new rule that would qualify under the second

Teague exception for retroactive application of new procedural rules as a watershed rule. Bockting equates *Crawford* to *Gideon* arguing that both cases replaced an existing rule that utilized an unreliable and unpredictable case-by-case assessment with an explicit rule. Bocting also asserts both cases changed our understanding of a constitutional right at a conceptual level, but did not create a new right. According to Bockting, then, the perceived similarities lead to the conclusion that *Crawford* should be applied retroactively to cases on collateral review, such as the case at hand.

Respondent Bockting's argument completely misses the mark in a number of fundamental ways. The argument both includes points previously rejected by this Court as irrelevant to the retroactivity analysis, and at the same time excludes important, and essential, points that are central to the retroactivity analysis. Because Bockting's argument strays from the strict analytical process set forth in *Teague* and its progeny, he fails to address those essential points of legal relevance to the retroactivity analysis.

Likewise, Bockting's argument on whether 28 U.S.C. Section 2254(d) adopts the *Teague* exceptions for private conduct beyond criminal proscription and watershed rules is premised on a tortured reading of Section 2254(d) and a wholly unnecessary statutory construction analysis. The statute's language is plain on its face, and constitutes a clear statement of the intent of Congress to change existing law. The Court has settled the question by deciding that it is the law existing at the time of the relevant state court decision that controls the question of whether the state court decision is contrary to established federal law.

ARGUMENT

I. *CRAWFORD* IS NOT A RULE WITHOUT WHICH THE LIKELIHOOD OF AN ACCURATE CONVICTION IS SERIOUSLY DIMINISHED.

In his Merits Brief, Bockting fails to address the central issue of whether the new rule of *Crawford* is a rule without which the likelihood of an accurate conviction is seriously diminished. By neglecting this most central point, Bockting imperils his entire position.

The Petitioner argued extensively in the Merits Brief that the new rule of *Crawford* was not a watershed rule, because it was not a rule without which the likelihood of an accurate conviction is seriously diminished. Thus, the rule of *Crawford* is not amenable to retroactive application. But for the Ninth Circuit, all of the many circuit courts and state courts that have addressed whether *Crawford* applies retroactively agree with Petitioner's position. The Petitioner supported this argument with holdings from this Court and other courts, along with detailed analysis. The existence of this first prong of the two-pronged watershed standard, like the second for bedrock principles, is mandatory if a rule is to receive retroactive application. *Tyler v. Cain*, 533 U.S. 656, 665 (2001). Yet, Bockting neither argues nor shows that the *Crawford* rule meets this specific accuracy test. Bockting appears to briefly argue that *Crawford* may affect accuracy because it "created a new standard for accuracy," and that the *Crawford* rule is directed toward reliability. Resp.Br. 14, 21. This analysis is beside the point in the *Teague* analysis, as it fails to address the seminal issue of accuracy in the manner that *Teague* did.

Bockting errs in precisely the same way that the Ninth Circuit erred when it discussed the general benefits of confrontation, rather than the relevant core question—whether the new rule substantially increases the likelihood of an accurate conviction when compared to the former rule. Bockting has repackaged Judge McKeown's erroneous conclusion in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) (*Bockting I*) that confrontation is designed to promote accuracy. JA 128. As the dissent in *Bockting I* observed, Judge McKeown asked the wrong question in reaching her conclusion that *Crawford* applies retroactively because confrontation generally fosters accuracy. JA 149. Bockting's argument adopts the same error.

As Judge Wallace pointed out, the question is not whether testimony that has been subject to cross-examination is more likely to be reliable than that which was admissible under the regime of *Ohio v. Roberts,* 448 U.S. 56 (1980), but whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is one without which the likelihood of an accurate conviction is seriously diminished. JA 149-150. It is the *differential benefit to accuracy* of the new rule that must be assessed, and yet neither the circuit court majority, nor Bockting, addressed this mandatory analytical component of the watershed standard.

Moreover, Bockting makes the same mistake previously rejected by the Court in *Sawyer v. Smith*, 497 U.S. 227 (1990). Bockting argues only that *Crawford* "is entirely directed toward reliability under the *Teague* standard..." Resp.Br. 21. Bockting forwards the same argument rejected by this Court in *Sawyer* that it is enough under *Teague's* watershed rule that a new rule be aimed at improving the accuracy of trial. *Sawyer*, 497 U.S. at 242. This argument

fails to properly address the correct standard because increased accuracy alone is not sufficient. The correct test is whether the new rule is one without which the likelihood of an accurate conviction is *seriously diminished*, along with the second mandatory prong—that the new rule must be sweeping and fundamentally groundbreaking so as to alter our understanding of bedrock procedural elements. Bockting, like the majority below, is attempting to lower the standard for watershed rules.

II. THE *CRAWFORD* RULE IS NOT A SWEEPING RULE.

Bockting also fails to address the petitioner's argument that the *Crawford* rule is not a sweeping rule. Instead, Bockting argues that *Crawford* is like *Gideon* and unlike any case in recent constitutional jurisprudence. Resp.Br. 29. Although this argument points to no more than immaterial similarities, it does hint at a point quite the opposite from that Bockting seeks to make. In fact, the new rule of *Crawford* is unique in its effect on trial practice and the rights of criminal defendants. New procedural rules generally increase the scope of constitutional protections available to criminal defendants. *Crawford,* however, announced a new rule that at once created a new burden on states by requiring an actual opportunity for cross examination of a witness rather than allow his or her testimonial hearsay through another witness, and yet substantially *limited* the *scope* and *reach* of the Confrontation Clause. For the first time, *Crawford* now excludes non-testimonial hearsay from Sixth Amendment protection.

Post-*Crawford* confrontation, as a legal concept, is an entirely different animal than pre-*Crawford* confrontation, because the right to confront under the Sixth Amendment has

been limited to the single context of testimonial hearsay. Prior to *Crawford*, the Sixth Amendment right to confrontation implicated *any* hearsay evidence that the prosecutor wanted to introduce. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Within the context of testimonial hearsay, *Crawford* increased the states' burden to provide an opportunity for cross examination or to find such testimony excluded. The Sixth Amendment bars the admission of testimonial hearsay statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant has a prior opportunity for cross examination. *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2273 (2006). The flexibility offered by the former *Roberts* rule has been taken from the states and replaced by a rigid rule requiring actual, rather than substituted, cross examination.

Crawford, however, also significantly narrowed the *scope* of Sixth Amendment protection to exclude most hearsay. Now, only testimonial hearsay is protected by the Sixth Amendment. In separating general hearsay concepts from Sixth Amendment confrontation principles, the Court held in *Crawford* and *Davis* that the Confrontation Clause no longer implicates non-testimonial hearsay evidence: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis*, ___ U.S. at ___, 126 S. Ct. at 2273. Because of this narrowing process, *Crawford* is not a sweeping rule, and therefore not a watershed rule.

The instant case is an excellent example of the narrowing of the Sixth Amendment. Here, Detective Zinovich's testimony would fall under the admissibility bar of *Crawford* and *Davis*. As a state agent, the detective collected evidence for prosecution when he interviewed the child rape victim.

The testimony of the child's mother, while previously protected under the umbrella of the Sixth Amendment and the prophylactic *Roberts* process, is, however, no longer subject to any Sixth Amendment protections. Now, there is no Sixth Amendment protective device for the non-testimonial hearsay presented by the mother of the child victim. Had the child told a neighbor of her step-father's sexual attacks, or a teacher, school nurse, or a friend, all of this testimony would not be inadmissible under the Sixth Amendment in the post-*Crawford* context.

This Court held in *Tyler v Cain*, 533 U.S. 656 (2001), that for a new procedural rule to be considered a watershed rule, it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The Court further held in *O'Dell v. Netherland*, 521 U.S. 151 (1997), and *Beard v. Banks*, 542 U.S. 406 (2004), that a new rule is not a bedrock procedural element under the *Teague* standard unless it is as "sweeping" and groundbreaking, core to the criminal process, such as the right to counsel in *Gideon*. The rule of *Gideon* applied to every criminal defendant in every serious criminal case—the ex nihilo creation of a new fundamental right. In contradistinction, *Crawford* substantially narrowed the scope and reach of the Confrontation Clause to the single subject of *testimonial* hearsay, rather than the broader context of hearsay in general. It cannot be said that the *Crawford* rule is as sweeping and groundbreaking as was the general and broad-based right to counsel that was pronounced in *Gideon*.

III. *CRAWFORD* DIFFERS SUBSTANTIALLY FROM *GIDEON* IN SCOPE AND OPERATION, AND IN ITS HISTORICAL UNDERPINNINGS.

Bockting argues that *Crawford* is similar to *Gideon* in a number of respects. In forwarding this argument, however, Bockting is forced to rely on immaterial (and in some cases, non-existent) similarities. At the same time, Bockting ignores or glosses over the many profound and basic points of complete dissimilarity between these decisions. All of the many federal and state courts,[1] save for the Ninth Circuit, that have rejected the retroactive application of *Crawford*, have implicitly, if not explicitly, rejected any argument that *Crawford* is on par with *Gideon* in any material manner. Pet.Br. 15. In his dissent from the Ninth Circuit's denial of en banc reconsideration, Judge O'Scannlain rightly observed that "*Crawford* hardly bears comparison with *Gideon*...The *Crawford* rule simply does not approach [its] magnitude...The two judge *Bockting* majority thus stands alone in its conviction that *Crawford* applied retroactively." JA 215, 223. Yet, Bockting still attempts to find similarities in such diametrically different decisions.

Bockting argues, for example, that *Crawford* and *Gideon*, represented a return to original constitutional principles. This argument misses the mark for two reasons. First, as explained immediately below, *Gideon* did not represent a return to an earlier principle, but rather, as explained by Judge O'Scannlain in his dissenting opinions, it was a

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[1] Courts finding that *Crawford* does not apply retroactively include the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, as well as state appellate courts in Florida, Kansas, Colorado, California, Minnesota, and Washington.

groundbreaking new rule that announced not just a new rule that "reshaped the contours" of an existing right as did *Crawford*, but was one that announced, ex nihilo, a *new fundamental right* that did not previously exist: the general right to counsel in serious cases without a need to find "special circumstances." JA 215.

Further, and as important to the analysis of Bockting's "original principles" argument, is the clear fact that this Court has wholly rejected this same argument in the context of *Teague's* watershed standard. This argument clearly confuses the appropriate *Teague* standard with irrelevant musings about the Founders' beliefs, and the argument improperly leads away from the relevant test for watershed rules. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court felt obligated to correct the inmate's deviation from the proper standard, and said of an inmate's similar confusion of the *Teague* standard with an original principles argument:

> Respondent [inmate Summerlin] further notes that common-law authorities praised the jury's factfinding ability. See, *e.g.*, 3 W. Blackstone, Commentaries on the Laws of England 380 (1768); *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483 (1794) (jury charge of Jay, C.J.).
>
> The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so-they certainly thought juries were more independent, see *Blakely v. Washington*, post, 542 U.S. 296, ___ - ___, 124, S.Ct. 2531, 2538-40, 159 L.Ed. 2d 403, 2004 WL 1402697). Nor is the question whether juries actually are more accurate factfinders than judges (again, perhaps so). ***Rather, the question is whether judicial***

> ***factfinding so 'seriously diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach...The evidence is simply too equivocal to support that conclusion.***

Summerlin, 542 U.S. at 355-56 (emphasis added). It appears from the Court's comments concerning the inmate's original principles argument in *Summerlin* that it views such argument as deviating from the only relevant inquiry—that of the oft-stated watershed standard.

Bockting's second point in his similarity argument is that *Crawford* is like *Gideon* because neither created a new right, but merely changed the understanding of a constitutional right at a "conceptual level." This argument relies on a fundamental misunderstanding of *Gideon*. *Gideon* is unique in that it announced a new rule that *also* created a new fundamental right. Prior to *Gideon*, the Court had not established a general right to counsel in all felony cases in state prosecutions, including a right to the appointment of counsel in indigent cases at public expense. Bockting concedes this point. Resp. Br. 24. In *Betts v. Brady*, 316 U.S. 455 (1942), the Court considered whether the concept of due process incorporated in the Fourteenth Amendment obligated the states to furnish counsel in felony cases, there, for a charge of robbery for which the defendant received a sentence of eight years. The Court held that the Fourteenth Amendment did not require the appointment of counsel.[2] In

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[2] Justice Harlan's concurring opinion in *Gideon* observed that the Court's most immediate pre-*Betts* decision, *Powell v. Alabama*, 287 U.S. 45 (1932), was not in conflict with *Betts*, as that decision was a capital case where the Court found that, under the particular facts there presented, the ignorance and illiteracy of the defendants, along with their youth and demonstrated community hostility were

Gideon, the issue was whether the Court should reconsider the *Betts* decision. *Gideon*, 372 U.S. at 338. The *Gideon* Court observed that in *Betts*, it had concluded that the appointment of counsel to indigents in serious cases was not a fundamental right, essential to a fair trial that was extended through the Fourteenth Amendment to the states. *Gideon*, 372 U.S. at 340. The *Gideon* Court reversed the *Betts* decision, and held for the first time that the general right to counsel in all serious cases such as Clarence Gideon's (his sentence was five years' imprisonment) was a fundamental right that extended the Sixth Amendment right to the states through the Fourteenth Amendment. *Gideon*, 372 U.S. at 342. In his dissent in *Bockting v. Bayer*, 418 F.3d 1055 (9th Cir. 2005) (*Bockting III*), Judge O'Scannlain noted that the *Gideon* Court, had by this action, created the right ex nihilo to counsel in state prosecutions. JA 215.

Conceptually, in attempting to compare *Crawford* with *Gideon*, Bockting confuses *Crawford* with *Pointer v. Texas*, 380 U.S. 400 (1965). In *Pointer*, the Court extended the right of confrontation to the states. Accordingly, *Pointer* created the underlying right to confrontation in state prosecutions, whereas *Crawford* reshaped the contours of that right. But *Crawford* is not *Pointer*. *Crawford* created no new fundamental right, while *Gideon* created a new right.

The uniqueness of *Gideon* is core to the analysis, because each of the rights that have formed the basis for this Court's

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the factors that guided the decision. *Gideon*, 372 U.S. at 349-50 (Harlin, J., concurring). Justice Harlan recognized that the pre-*Gideon* law on the appointment of counsel to indigent defendants turned on the existence of "special circumstances," and did not reflect a general right to counsel. *Id.*

Teague jurisprudence have been vitally important rights that both fostered accuracy *and* improved the operation of fairness and due process. Yet, none of the new rule cases considered by the Court since *Teague* has been found to be a watershed decision:

> Indeed, *Crawford's* rule does less to decrease the chance of an inaccurate conviction than many rules that have been held *not* to apply retroactively...
>
> A parallel principle governs this case: even though the Confrontation Clause demands the exclusion of out-of-court testimony—and even though blanket exclusion of such testimony may, in fact, be more accurate than the more nuanced rule of *Roberts*—there is little reason to think that judicial determination of reliability so seriously diminishes accuracy as to make likely the conviction of the innocent. If *Apprendi*, *Ring*, and *Blakely*, with their massive implications striking to the core of our system of criminal justice, were not watershed rules with retrospective application, then surely the relatively minor—though still quite significant—change wrought by *Crawford* is not either.

JA 216, 221 (Judge O'Scannlain, dissenting). To these cases cited by Judge O'Scannlain, the Petitioner would add the decisions of *Sawyer*, *Summerlin*, and *O'Dell*, all of which held that new rules that directly implicated core fundamental rights in capital sentencing proceedings, and that were designed to foster fairness and accuracy in those proceedings, were held not to be watershed rules. *Crawford*, likewise, is not a watershed rule.

In *Summerlin*, the Court observed that:

> Our decision in *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) (per curiam), is on point. There we refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States...We concluded that '[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.' 392 U.S., at 634, 88 S.Ct. 2093. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

Summerlin, 542 U.S. at 356-57. In this regard, *Summerlin* controls this retroactivity analysis. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, and if under *Summerlin* a trial held without a jury in the capital sentencing phase was not impermissibly inaccurate, it is equally hard to see how a trial in which a judge, who does no more than make findings of reliability of a hearsay witness, would implicate impermissible inaccuracy.

Crawford, furthermore, as a rule that reshaped the contours of the already-existing right to confrontation, in distinction to one that created ex nihilo a new right, is a right subject to harmless error analysis. If the right to confrontation is subject to harmless error analysis, and can therefore be dispensed with based on other case variables such as the strength of the state's case, it is impossible to conclude that the right is so central to bedrock principles of criminal

procedure that it is a watershed rule. In rejecting retroactive application for *Crawford*, the Tenth Circuit held that watershed status and harmless error are incompatible:

> Unlike *Gideon*, *Crawford* does not 'alter[ ] our understanding of what constitutes basic due process,' *Mora*, 293 F.3d at 1219, but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. *Crespin v. New Mexico*, 144 F.3d 641, 649 (1998). It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process. See *Mora*, 293 F.3d at 1219 (holding that *Apprendi v. New Jersey* did not alter fundamental due process rights, in part because *Apprendi* errors could be excused given overwhelming evidence). Accordingly, we conclude that *Crawford* is not a watershed decision and is, therefore, not retroactively applicable to Brown's initial habeas petition.

Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004). *Crawford* did not create a new fundamental right and is intrinsically different from *Gideon*. Bockting's argument for retroactive application of *Crawford* based upon perceived similarities to *Gideon* must be rejected.

IV. 28 U.S.C. SECTION 2254(D) DOES NOT ADOPT THE *TEAGUE* EXCEPTIONS FOR WATERSHED RULES.

Respondent Bockting and amicus Public Defender Service for the District of Columbia (P.D.S. amicus) argue that the controlling statute, 28 U.S.C. Section 2254(d)(1),

incorporates the exceptions to retroactivity under *Teague* for private conduct beyond criminal proscription and watershed rules. The primary weakness in Bockting's argument is that it ignores the palpable tension that exists between the plain language of the statute and the *Teague* exceptions that are exemplified by Judge McKeown's opinion below. The tension in Judge McKeown's words is unavoidable; the position that the statute adopts the *Teague* exceptions results in an illogical and absurd reading of what P.D.S. amicus for the Respondent concedes repeatedly is plain statutory language. P.D.S. Br. 2. Under that analysis, the Nevada Supreme Court's decision in applying *Idaho v. Wright* and *Ohio v. Roberts* was objectively reasonable for eleven years, and then suddenly, somehow, became objectively *unreasonable* upon the announcement of *Crawford* in 2004. Neither the Ninth Circuit panel in *Bockting I* nor Respondent's amicus explain how such an ex post facto logical reconfiguration can occur.

> The Nevada Supreme Court relied on *Roberts* to conclude that Autumn was 'unavailable' and that her statements bore the requisite 'particularized guarantees of trustworthiness.' Bockting v. State, 109 Nev. 103, 847 P.2d 1364, 1367-70 (Nev. 1993). As we know now, but the Nevada Supreme Court could not have divined, *Crawford* dictates the right to cross-examine the witness. The progeny of *Roberts*, such as the multi-factor reliability test developed in *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (9th Cir. 1990) (sic) cannot override the right of confrontation. Thus, the Nevada Supreme Court's decision was 'contrary to' established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*.

JA 136. The unmistakable illogic of this position is that it at once concedes the correctness of the state court's application of federal law, and yet at the same time accuses the same state court of deciding the question in a manner that was contrary to federal law. Both precepts cannot be correct.

Because the Nevada Supreme Court's decision in Bockting's case preceded *Crawford* by eleven years, it is not logically possible for that decision to be contrary to *Crawford*. When Bockting was first before this Court in 1990, on certiorari following his direct appeal, the matter was remanded back to the Nevada Supreme Court with instruction to reconsider its decsion in light of *Idaho v. Wright*, 497 U.S. 805 (1990). JA 44. The Nevada Supreme Court did exactly that, and applied that law which was clearly established—*Idaho v. Wright*. JA 45-60. For Bockting's argument to be accepted, this Court would have to accept a wholly unpredictable and fickle definition of the plain statutory term "clearly established Federal law," one that would be unstable, variable, and ever-changing. Such an oscillating standard would make impossible any sense of finality based on the good faith application of existing law by state courts in the face of new rules from this Court.

It is curious indeed that Respondent's P.D.S. amicus engages an interpretive process analyzing a purported "perverse incentive structure" (P.D.S. Br. 14) and compares Section 2254(d) to external provisions to draw out the meaning of Section 2254(d)(1) in light of the fact that P.D.S. amicus and Bockting agree that the statutory language is plain on its face. The Petitioner is not alone in its position that "the statute freezes the applicable law for state prisoners on federal habeas review to law 'that exists at the time the state court decision is made." P.D.S. Br. 14, 15. The plain and unambiguous language of the statute, set forth in the *past*

tense as a participle ("established," rather than "to be established at a future time") serves as the unmistakably clear statement required by *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S. Ct. 2749, 2764 (2006), that P.D.S. amicus asserts is missing. Such a lengthy statutory construction exercise is unnecessary. "[W]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Dodd v. United States*, 545 U.S. 353, 359 (2005). This Court should quickly decline Bockting's invitation to redefine the plain words of the statute and to add words that are not there.

This is especially true in light of the fact that this Court has already recognized that the words of the statute mean precisely what they say. Surprisingly, however, Bockting and P.D.S. amicus give short shrift to the controlling case on this point. Petitioner has already pointed out that this Court in *Lockyer v. Andrade*, 538 U.S. 63 (2003), recognized that the timing of the clearly established Federal law requirement in Section 2254(d)(1) as being "at the time the state court renders its decision." *Andrade*, 538 U.S. at 71. Bockting assails the reasoning of the Court because, he asserts, this language does not appear in the statute itself. (Resp. Br. 35). But of course, it does, as the term "clearly established" is presented in the past tense. Because the statutory provision is plain on its face, and because the Court has settled the question of its meaning, reliance on statutory construction rules is unnecessary. This issue is settled.

Even if construction were necessary, Bockting might have noted reference to the one pre-AEDPA case where the same term was defined harmoniously with the Court's subsequent *Andrade* decision; one would need to look no further than the legislative history and early decisions of this Court defining

the same term to find that the intent, and indeed the genesis itself, of the "clearly established" language demonstrates that it refers to the time of the state court decision, as the Court has recently repeated in *Andrade*. A commentator recently observed:

> While the legislative history does shed some light on how the standard of review provisions were intended to operate, it does not specifically address the meaning of 'clearly established Federal law as determined by the Supreme Court.'
>
> The closest reference to the clearly established language was a reference to the governmental qualified immunity doctrine in tort law when Senator Orrin Hatch, the primary sponsor of § 2254, referred to *Harlow v. Fitzgerald* [457 U.S. 800 (1982)]. Arguably, that reference was not made as a suggestion to adopt the same 'clearly established' standard from the qualified immunity context, but rather to 'compare[ ] the deference provisions in the habeas reforms to the preference for reasonableness that courts give in other areas of the law.'

Berry, Melissa M., *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, Cath. U. L. Rev., 747, 761-64 (Sp. 2005).

But the suggestion that the reference was, in fact, intended to adopt the same "clearly established" standard should not be so quickly dispensed with, especially in light of the Court's decision in *Andrade* that also concluded that the time of the relevant state court decision controls the question. In *Harlow*, the Court took the opportunity to define the term "clearly

established law" in the context of qualified immunity for government officials. The Court's decision was based, in great part, on the need for predictability and the need for officials to have notice of what the law demanded of their actions *at the time of those actions*:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful...
>
> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow, 457 U.S. at 818, 819. This early view of the relevant timing of clearly established law is fully consonant with the plain meaning of the statutory provision and with the decisions in *Andrade* and *Williams v. Taylor*, 529 U.S. 362, 412 (2000). It is the clearly established law existing at the time that the official acts, and not after a later change in law, that determines the immunity of the official.

Like the holding in *Harlow*, Section 2254(d) legislates a specific and logical relationship between the timing of an act, the state's decision, and the state of the relevant law at *that* time. Under *Harlow*, the state of the law at the time the official acts controls the question of immunity. Likewise, under *Andrade*, the state of the law at the time the state court acts controls the question of whether the state court's decision was contrary to federal law. Just as the official cannot be held liable for the future state of the law of which he has no

notice, a state's strong interest in the finality of criminal judgments cannot be penalized based on future and unpredictable changes in the law. This reading of Section 2254(d) avoids the logical pitfalls of Judge McKeown's view that the Nevada Supreme Court's decision in 1993 was contrary to law that did not exist, and of which she concedes the court could not have divined. As this Court has stated, "clearly established Federal law" under Section 2254(d) refers to decisions of the Court as of the time of the relevant state court decision is rendered.

CONCLUSION

Petitioners reassert their request that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

MARVIN HOWARD BOCKTING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), that the testimonial hearsay statements of an unavailable declarant are inadmissible absent a prior opportunity for cross-examination applies retroactively to cases on collateral review.

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In the Supreme Court of the United States

No. 05-595

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

MARVIN HOWARD BOCKTING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), that the testimonial hearsay statements of an unavailable declarant are inadmissible absent a prior opportunity for cross-examination applies retroactively to cases on collateral review. The United States has a substantial interest in the resolution of that question. The rule adopted by the Court in *Crawford* applies to federal as well as state criminal trials. Whether *Crawford* applies retroactively will therefore have a significant impact on collateral challenges to federal convictions.

STATEMENT

1. In 1987, respondent lived in a motel in Las Vegas, Nevada, with his wife, Laura, their child, Honesty, and his wife's six-year-old daughter, Autumn. Pet. App. 18a, 104a-105a. On Saturday evening, January 16, 1987, Autumn woke up frightened and crying. *Id.* at 18a, 105a. She was initially reluctant to tell her mother what was wrong because she was afraid that respondent would "beat her butt" and that "mom would make dad leave." *Id.* at 105a. After receiving reassurance, Autumn told her mother that respondent had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," and that "he put his chin on her pee-pee." *Id.* at 105a n.1.

On the following Tuesday, January 19, 1987, Laura took Autumn to the hospital, where a doctor examined her. Pet. App. 18a, 105a. The doctor found a tear in Autumn's rectal sphincter and a wide opening in her hymenal ring. *Ibid.* Detective Zinovitch attempted to question Autumn at the hospital, but she was distraught and responded only that someone had hurt her. *Ibid.*

Two days later, Detective Zinovitch interviewed Autumn at his office in a room designed to put her at ease. Pet. App. 19a, 105a-106a. Autumn gave the same description of respondent's conduct that she had given to her mother. *Ibid.* Autumn also demonstrated with anatomically correct dolls what respondent had done to her. *Id.* at 106a. Respondent was arrested and charged with four counts of sexual assault on his stepdaughter. *Ibid.*

At respondent's preliminary hearing, Autumn testified that she could not remember what respondent had done to her or what she had told her mother or the de-

tective. Pet. App. 19a, 106a-107a. The judge declared Autumn an unavailable witness, and the preliminary hearing proceeded with the testimony of Laura and Detective Zinovitch. *Id.* at 19a, 107a.

At trial, the judge held a hearing outside the jury's presence to determine whether Autumn would be able to testify. Pet. App. 107a. When asked to take the oath, Autumn did not respond. *Ibid.* Efforts to persuade Autumn to cooperate were unsuccessful, and the judge declared her unavailable to testify at trial. *Ibid.*

The prosecutor sought to introduce Autumn's statements to her mother and Detective Zinovitch pursuant to Nev. Rev. Stat. § 51.385(1)(a) (2005). Pet. App. 107a. That statute allows the admission of a child's out-of-court statements describing sexual abuse when the circumstances afford sufficient guarantees of trustworthiness and the child is unable to testify or is unavailable. Nev. Rev. Stat. § 51.385(1)(a) (2005). Following a hearing, the court admitted the statements. Pet. App. 107a. The court also admitted into evidence Autumn's testimony at the preliminary hearing. *Ibid.*

2. Respondent was convicted of sexual abuse of a minor and was sentenced to life imprisonment. Pet. App. 19a. The Nevada Supreme Court dismissed respondent's appeal, rejecting his claim that admission of his step-daughter's statements pursuant to Nev. Rev. Stat. § 51.385(1) (2005) violated the Confrontation Clause. Pet. App. 120a-123a. This Court vacated and remanded for further consideration in light of *Idaho* v. *Wright*, 497 U.S. 805 (1990). Pet. App. 119a.

On remand, the Nevada Supreme Court affirmed Bockting's conviction. Pet. App. 103a-118a. Applying *Wright*, the court held that there were sufficient particularized guarantees of trustworthiness to permit the in-

troduction of Autumn's statements to her mother and Detective Zinovitch. *Id.* at 112a-118a. The court concluded that the following circumstances together showed that Autumn's statements were trustworthy: "(1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowle dge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; (5) the child's display of affection for [respondent] as he was preparing to leave was indicative of love rather than hate." *Id.* at 115a-116a.

Respondent petitioned the state trial court for post-conviction relief. Pet. App. 83a. The court denied the petition, and the Nevada Supreme Court dismissed the appeal. *Ibid.*

3. Respondent then filed a petition for a writ of habeas corpus in federal district court. Pet. App. 79a. In an amended complaint, he asserted, *inter alia*, that the admission of his stepdaughter's out-of-court statements violated the Confrontation Clause. *Id.* at 80a. The district court denied relief, holding that the Nevada Supreme Court's decision was neither "contrary to," nor "involved an unreasonable application of, clearly established federal law" and that habeas relief was therefore unavailable under 28 U.S.C. 2254(d)(1). Pet. App. 83a-89a (quoting 28 U.S.C. 2254(d)(1)).

While Bockting's appeal of that decision was pending before the Ninth Circuit, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation

Clause of the Sixth Amendment generally bars the admission into evidence of testimonial out-of-court statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. The court of appeals requested supplemental briefing on whether *Crawford* applied retroactively to respondent's collateral challenge. Pet. App. 77a-78a.

4. A divided panel of the court of appeals reversed. Pet. App. 15a-76a. A majority of the court (Judge McKeown joined by Judge Wallace) first held that *Crawford* was a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989), because it departed from the test of admissibility set forth in *Ohio* v. *Roberts*, 448 U.S. 56 (1980). The court explained that, while *Roberts* allowed admission of all hearsay statements as long as the statements fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness, *Crawford* held that testimonial hearsay statements are inadmissible unless there has been a prior opportunity for cross-examination. Pet. App. 21a-24a.

A majority of the court (Judge McKeown, joined by Judge Noonan) then held that *Crawford*'s requirement of cross-examination as a precondition for admissibility of testimonial hearsay is applicable to cases on collateral review because it is a bedrock rule of criminal procedure and therefore falls within the second exception to *Teague*'s bar on retroactivity. Pet. App. 24a-34a. The court concluded that the rule in *Crawford* is one "without which the accuracy of convictions would be seriously undermined." *Id.* at 30a. The court further concluded that *Crawford*'s cross-examination rule cannot be dismissed as "incremental," but instead is "an absolute prerequisite to fundamental fairness." *Ibid.* (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 244 (1990)).

A majority of the court (Judge McKeown, joined by Judge Noonan) also held that 28 U.S.C. 2254(d)(1) did not preclude habeas relief because the Nevada Supreme Court's decision upholding the admissibility of Autumn's hearsay statements to the detective was "contrary to * * * clearly established Federal law." Pet. App. 35a (quoting 28 U.S.C. 2254(d)(1)). Interpreting Section 2254(d)(1) to incorporate the *Teague* exceptions, the court reasoned that the Nevada Supreme Court had reached a decision "'contrary to' established Supreme Court precedent in *Crawford*, as made retroactive under *Teague*." *Id.* at 36a. Finally, the court held that admission of Autumn's statements to the detective was not harmless error. *Id.* at 36a-37a.

In a concurring opinion, Judge Noonan expressed the view that *Crawford* did not establish a new rule. Pet. App. 37a-41a. Judge Noonan reasoned that prior Supreme Court decisions, including *Roberts*, had admitted testimonial statements only when there was a prior opportunity for cross-examination. *Id.* at 40a. While acknowledging that *Crawford* departed from the rationale of *Roberts*, Judge Noonan concluded that "correction of a misinterpretation does not create a new rule," and that a "change in rationale" is not "a change in rules." *Ibid.*

Judge Wallace concurred in part and dissented in part. Pet. App. 41a-76a. He agreed with Judge McKeown that *Crawford* established a new rule, but he dissented from the panel's holding that *Crawford* falls within the second *Teague* exception. *Id.* at 41a-53a. Judge Wallace explained that "[t]here is simply no solid evidence that *Roberts* has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority." *Id.* at 48a. Judge Wallace further explained that the

focus of the Court's decision in *Crawford* was on "fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the *Roberts* regime." *Id.* at 51a. Because Judge Wallace concluded that *Crawford* is not retroactive under *Teague*, he did not reach the question whether "AEDPA 'nullifies' the *Teague* exceptions, such that no 'new rule'—even one fitting within one of those exceptions—may serve as the basis for habeas relief." *Id.* at 53a (citation omitted).

With nine judges dissenting, the Ninth Circuit denied rehearing en banc. Pet. App. 1a-12a. In an opinion joined by all of the dissenting judges, Judge O'Scannlain reasoned that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), is the only new rule that this Court has viewed as satisfying the second *Teague* exception, and that *Crawford* does not approach *Gideon* in the magnitude of its effect on the accuracy of criminal proceedings. Pet. App. 3a.

SUMMARY OF ARGUMENT

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules do not apply retroactively unless they are substantive rules or watershed rules of criminal procedure. Because *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), announced a new rule that is neither substantive nor a watershed rule of criminal procedure, it does not apply retroactively on collateral review.

A. A decision that overrules a prior decision necessarily creates a new rule, and *Crawford* falls in that category. In holding that a prior opportunity for cross-examination is an indispensable requirement for admission of testimonial hearsay of an unavailable declarant and that a finding of reliability is insufficient, *Crawford*

overruled *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and established a new rule.

B. *Crawford*'s new rule is not substantive and therefore does not fall within the first *Teague* exception. The rule that testimonial hearsay may not be admitted absent a prior opportunity for cross-examination is manifestly procedural. It has nothing to do with the range of conduct or the class of persons that the law punishes. Instead, it affects only the manner of determining whether a defendant has violated the law. That rule is therefore procedural.

C. *Crawford*'s new rule also does not fit within *Teague*'s second exception for watershed rules of criminal procedure. That exception applies only when (1) infringement of the new rule seriously diminishes the accuracy of convictions, and (2) the rule alters our understanding of the bedrock procedural elements essential to a fair trial. *Crawford*'s new rule satisfies neither requirement.

1. Because the old rule of *Roberts* incorporated a reliability requirement—allowing testimonial hearsay to be introduced only when it was so trustworthy that cross-examination would not significantly add to reliability—the admission of evidence allowed by *Roberts* but excluded by *Crawford* could not have seriously diminished the accuracy of convictions. Indeed, *Roberts*, whatever its deficiencies, also enhanced accuracy relative to the more textually-grounded *Crawford* rule in two respects. When a declarant who has made a highly reliable out-of-court statement is unavailable to testify, the effect of *Crawford*'s exclusionary rule is the loss of highly reliable evidence that would have been admissible under *Roberts*. And because *Roberts* requires adequate indicia of reliability for both testimonial and non-testi-

monial hearsay, the *Roberts* rule furnishes a greater guarantee of reliability with respect to non-testimonial hearsay. *Roberts*' accuracy-enhancing features reinforce the conclusion that its application does not seriously diminish accuracy.

The reasoning in *Crawford* is fully consistent with that conclusion. *Crawford* did not overrule *Roberts* based on a determination that *Roberts* had seriously diminished accuracy, but because it deviated from the Framers' understanding of the meaning of the Confrontation Clause.

2. *Crawford* also did not alter our understanding of bedrock elements of criminal procedure that are essential to a fair trial. It has nowhere near the fundamental and sweeping importance of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the only rule that this Court has identified as falling within *Teague*'s second exception. The right-to-counsel established in *Gideon* pervasively affects the fairness of every aspect of the trial, while *Crawford* affects the admissibility of one narrow category of evidence—testimonial hearsay. Indeed, because *Roberts* had already excluded testimonial hearsay unless it was sufficiently trustworthy, *Crawford* only incrementally affected the admissibility of that category of evidence. In light of its limited scope and incremental effect, *Crawford* cannot be viewed as indispensable to a fair trial.

That is particularly true because a series of complementary procedural protections helped to ensure that trials under *Roberts* were fundamentally fair. Among other things, a defendant could cross-examine the witness to the testimonial statement, introduce evidence that would call into question the veracity of the declarant or the reliability of his statement, and count

on the common sense of the jury to evaluate the reliability of the statement in light of all the evidence.

Crawford's relationship with the large body of Confrontation Clause law that preceded it confirms its non-bedrock status. It had no effect on numerous Confrontation Clause principles, including those governing cross-examination of live witnesses and face-to-face confrontation. And while it overruled *Roberts*, it is consistent with the results of every prior decision except one. Because *Crawford* is one of several rules that implement the right to confrontation, and its incremental protection is not indispensable to a fair trial, it is not the kind of bedrock rule that falls within *Teague*'s second exception.

ARGUMENT

CRAWFORD DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), the Court held that testimonial hearsay from an unavailable declarant is generally inadmissible under the Confrontation Clause unless the defendant had a prior opportunity for cross-examination. The question presented in this case is whether *Crawford*'s requirement of a prior opportunity for cross-examination of the declarant of a testimonial statement applies retroactively to cases on collateral review.[1]

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[1] The only testimonial hearsay at issue here is Autumn's statement to Detective Zinovitch. The Nevada Supreme Court determined that Autumn was unavailable. Pet. App. 108a n.4. The question whether *Crawford*'s unavailability requirement applies retroactively is thus not at issue here. In any event, it is unclear whether the law in effect at the time respondent's conviction became final would have required unavailability as a precondition for admission of Autumn's statement to the detective. See *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) ("In the usual

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules are generally inapplicable to cases that have already become final. That general bar on retroactivity reflects a recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. The general rule against retroactive application of new rules is subject to two limited exceptions. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). Second, new procedural rules apply retroactively only when they constitute "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (internal quotation marks and citation omitted). The latter category "is extremely narrow," *Summerlin*, 542 U.S. at 352, and "it is unlikely that any of these wa-

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case * * * , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."); *United States* v. *Inadi*, 475 U.S. 387 (1986) (unavailability is not a requirement for the admission of statements made in furtherance of a conspiracy); *Idaho* v. *Wright*, 497 U.S. 805, 816 (1990) (assuming without deciding that unavailability was a precondition to admissibility of a victim's statements to a doctor that were not made in furtherance of medical treatment); *White* v. *Illinois*, 502 U.S. 346 (1992) (unavailability requirement does not apply to excited utterances or statements made for purpose of medical diagnosis). Judge Wallace, the only judge who examined respondent's Confrontation Clause claim under *Roberts*, concluded that *Roberts* required a finding of unavailability. Pet. App. 57a. He further concluded that the Nevada Supreme Court's finding of unavailability was not unreasonable and that respondent therefore was not entitled to federal habeas relief. *Id.* at 58a-62a.

tershed rules ha[s] yet to emerge." *Tyler* v. *Cain*, 533 U.S. 656, 667 n.7 (2001) (internal quotation marks and citation omitted). Because *Crawford*'s cross-examination holding is a new rule, and that rule is neither a substantive rule nor a watershed rule of criminal procedure, it does not apply retroactively on collateral review.[2]

A. *Crawford* Announced A New Rule

A rule is "new" for *Teague* purposes unless it was "*dictated*" by the precedent in effect when the defendant's conviction became final. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). While that inquiry can be difficult in some cases, no such difficulty arises when a decision overrules a prior decision. Whatever weaknesses may be apparent in a precedent of this Court, such a precedent can scarcely *dictate* its own overruling. Any decision that overrules a prior decision necessarily creates a new rule. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). *Crawford* is such a decision.

When respondent's conviction became final, *Ohio* v. *Roberts*, 448 U.S. 56 (1980), allowed admission of any out-of-court statement of an unavailable declarant when the statement had "adequate indicia of reliability." *Id.* at 66 (internal quotation marks and citation omitted). Statements had adequate indicia of reliability when they

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[2] Other than the court below, every court of appeals that has considered the question has reached that conclusion. *Mungo* v. *Duncan*, 393 F.3d 327, 332-336 (2d Cir. 2004), cert. denied, 544 U.S. 1002 (2005); *Lave* v. *Dretke*, 444 F.3d 333, 334-336 (5th Cir.), petition for cert. pending, No. 05-11552 (filed June 13, 2006); *Dorchy* v. *Jones*, 398 F.3d 783, (6th Cir. 2005); *Bintz* v. *Bertrand*, 403 F.3d 859, 865-867 (7th Cir.), cert. denied, 126 S. Ct. 174 (2005); *Murillo* v. *Frank*, 402 F.3d 786, 788-791 (7th Cir. 2005); *Brown* v. *Uphoff*, 381 F.3d 1219, 1225-1227 (10th Cir. 2004), cert. denied, 543 U.S. 1079 (2005); *Espy* v. *Massac*, 443 F.3d 1362, 1366-1367 (11th Cir. 2006).

fell within a "firmly rooted hearsay exception" or when they bore "particularized guarantees of trustworthiness." *Ibid.* *Crawford* held that, with respect to testimonial out-of-court statements, a finding of reliability is insufficient to satisfy the Confrontation Clause. As to that class of hearsay statements, the Court held, the Confrontation Clause bars admission unless there has been a prior opportunity for cross-examination. 541 U.S. at 68. In holding that a prior opportunity for cross-examination is an indispensable requirement for admission of testimonial hearsay and that a finding of reliability is insufficient, *Crawford* overruled *Roberts* and established a new rule. See *Davis* v. *Washington*, 126 S. Ct. 2266, 2275 n.4 (2006) ("We overruled *Roberts* in *Crawford* by restoring the * * * cross-examination requirement[].").

Crawford cannot be excised from the category of new rules on the theory that no prior Supreme Court decision had upheld admission of testimonial statements absent a prior opportunity for cross-examination. See Pet. App. 39a-40a (Noonan, J.). In *White* v. *Illinois*, 502 U.S. 346, 349-351 (1992), the Court upheld admission of a child's statements to a police officer about a past incident even though there was no prior opportunity for cross-examination. The Court in *Crawford* expressly acknowledged that *White* was "arguably in tension with the rule requiring a prior opportunity for cross-examination." 541 U.S. at 58 n.8.

More fundamentally, in deciding whether a decision establishes a new rule under *Teague*, the question is not whether it can be *harmonized* with the results of prior precedents, but whether it is *compelled* by the constitutional interpretation that produced those results. *Banks*, 542 U.S. at 411. The precedential effect of the

Court's decisions is determined not only by their specific results, but also by the "rationale upon which the Court based the results." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 66-67 (1996); accord *Tyler*, 533 U.S. at 663 n.4. Whether or not any prior case upheld admission of testimonial hearsay not subject to cross-examination, the constitutional interpretation in effect when respondent's conviction became final allowed admission of such statements when they had adequate indicia of reliability. Because *Crawford* overruled that interpretation of the Constitution, it established a new rule.

For similar reasons, that *Crawford* corrected a misinterpretation of the Constitution does not prevent the decision from having created a new rule. Pet. App. 40a (Noonan, J.). The benchmark for measuring whether a rule is "new" is not the original meaning of the Constitution, but the interpretation of the Constitution in effect when the defendant's conviction became final. *Banks*, 542 U.S. at 411. Thus, while *Crawford*'s overruling of *Roberts* may have restored the original meaning of the Confrontation Clause, it nonetheless created a new rule. See *Murillo* v. *Frank*, 402 F.3d 786, 790 (7th Cir. 2005) ("*Crawford* was not 'dictated' by *Roberts* * * * ; it broke from [it]. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break.").

B. *Crawford* Established A Procedural Rather Than A Substantive Rule

Because *Crawford* established a new rule, it does not apply retroactively unless it falls within one of the two *Teague* exceptions to the bar on retroactive application of new rules. *Crawford* does not fall within the first exception for new substantive rules because *Crawford*'s

holding that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is a procedural rather than a substantive rule.[3]

For *Teague* purposes, a rule is substantive when "it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. In contrast, a rule is procedural when it regulates "the *manner of determining* the defendant's culpability." *Ibid.* Under that standard, the holding in *Crawford* is clearly procedural rather than substantive. The rule that testimonial hearsay may not be admitted absent a prior opportunity for cross-examination has nothing to do with the range of conduct or the class of persons that the law punishes. Instead, whether viewed as a rule governing the admissibility of evidence, or a rule that entitles a defendant to cross-examine a declarant who makes a testimonial statement, it affects only the manner of determining whether a defendant has violated the law. Thus, as *Crawford* itself made clear, its rule that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is "a procedural rather than a substantive guarantee." 541 U.S. at 61.

C. *Crawford* Did Not Establish A Watershed Procedural Rule

The court of appeals recognized that *Crawford* established a new rule and that the rule is procedural rather than substantive. Pet. App. 24a. It concluded, however, that the rule fit within *Teague*'s second exception for

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[3] While the Court has on occasion referred to rules that place conduct or persons beyond the State's power to punish as exceptions to *Teague*'s bar on retroactivity, "they are more accurately characterized as substantive rules not subject to the bar." *Summerlin*, 542 U.S. at 352 n.4; *Banks*, 542 U.S. at 417 n.7.

watershed rules of criminal procedure. *Id.* at 24a-25a. That conclusion is incorrect. A rule has watershed status only if it satisfies two requirements: (1) "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks, citations, and emphasis omitted). The *Crawford* rule does not satisfy either requirement.

1. Application Of Roberts *Rather Than* Crawford *Does Not Seriously Diminish Accuracy*

a. Applying the *Roberts* rule rather than the *Crawford* rule does not seriously diminish the likelihood of an accurate conviction because *Roberts* incorporated a requirement of reliability. *Roberts* did not freely permit the admission of all out-of-court statements not subject to prior cross-examination. Rather, *Roberts* authorized the admission of such statements only when they bore "adequate indicia of reliability." 448 U.S. at 66 (internal quotation marks and citation omitted). That standard was a stringent one. "Reflecting [the Confrontation Clause's] underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," *Roberts* "countenance[d] only hearsay marked with such trustworthiness that there [was] no material departure from the reason of the general rule." *Id.* at 65 (internal quotation marks and citation omitted). That meant that an out-of-court statement could be admitted under *Roberts* only if it were "so trustworthy that adversarial testing would add little to its reliability." *Wright*, 497 U.S. at 821. Because *Roberts* allowed testimonial hearsay only when

cross-examination would not have added significant value, proper application of *Roberts*, by definition, could not have "seriously diminish[ed] the likelihood of obtaining an accurate conviction." *Tyler*, 533 U.S. at 665 (citation omitted).

b. In certain respects, the *Roberts* rule, with its focus on reliability, rather than confrontation for its own sake, promotes more accurate decisions than *Crawford*. For example, in some cases, *Crawford* "precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under [*Roberts*]." *Mungo* v. *Duncan*, 393 F.3d 327, 335 (2d Cir. 2004), cert. denied, 544 U.S. 1002 (2005). When the out-of-court declarant is available to testify, the *Crawford* rule may cause the government to call the declarant to the stand, thereby promoting accuracy. But when a declarant who has made a highly reliable out-of-court statement is unavailable to testify because of "death or incapacity or threats or loyalty to one's confederates," the effect of *Crawford*'s exclusionary rule is the loss of highly reliable evidence. *Murillo*, 402 F.3d at 790. In such cases, *Crawford* "will diminish, rather than increase, the accuracy of the process." *Mungo*, 393 F.3d at 336.

In addition, *Crawford* applies only to testimonial out-of-court statements. *Roberts*, in contrast, required adequate indicia of reliability for both testimonial and non-testimonial hearsay. Accordingly, at least with respect to non-testimonial hearsay, the *Roberts* rule furnishes a greater guarantee of reliability than *Crawford*. See *Davis*, 126 S. Ct. at 2274 (holding that the Confrontation Clause is limited to testimonial statements, an interpretation that "was suggested in *Crawford*, even if not explicitly held").

When a proposed new constitutional rule would diminish accuracy, it clearly is not retroactive. See *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994) (proposed rule applying Double Jeopardy Clause to bar second non-capital sentencing proceeding to determine persistent offender status not within second exception because a second proceeding would enhance accuracy); *Saffle*, 494 U.S. at 495 (proposed rule precluding an anti-sympathy instruction on the ground that it interferes with consideration of mitigating evidence does not fall within second exception because accuracy is more likely to be threatened than promoted by consideration whether the defendant can strike an emotional chord in a juror); *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990) (restrictions on police interrogation added by *Arizona* v. *Roberson*, 486 U.S. 675 (1988), do not fall within second exception because violation of the restrictions may increase the likelihood of obtaining an accurate decision). Whether or not the accuracy-enhancing features of *Roberts* mean that the *Roberts* regime promotes more accurate decisions than *Crawford*, those features, at a minimum, reinforce the conclusion that application of *Roberts* rather than *Crawford* does not *seriously diminish* accuracy. See *Summerlin*, 542 U.S. at 356 (that judicial factfinding is more accurate than jury factfinding in certain respects helps to show that judicial factfinding does not seriously diminish accuracy).

c. The court of appeals concluded that *Crawford* itself makes clear that, as applied to testimonial hearsay, replacement of cross-examination with a judicial determination of reliability seriously diminishes accuracy. Pet. App. 29a-30a. But *Crawford* did not overrule *Roberts* based on a determination that *Roberts* had seriously diminished the accuracy of verdicts. Rather, it over-

ruled *Roberts* because it was inconsistent with the Framers' understanding that the Confrontation Clause would bar the admission of testimonial hearsay absent a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless * * * the defendant had a prior opportunity for cross-examination."); *id.* at 55-56 ("[T]he historical sources * * * suggest that [the] requirement [of cross-examination] was dispositive, and not merely one of several ways to establish reliability."); *id.* at 60 (the rationale of *Roberts* is not "faithful to the original meaning of the Confrontation Clause"); *id.* at 68 ("Where testimonial hearsay is at issue * * * the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). Indeed, *Crawford* faulted the *Roberts* decision for placing too much emphasis on the overall goals of accuracy and reliability, rather than focusing on the textual guarantee of confrontation. The Court specifically explained that *Roberts*' mistake was that it had formulated a rule to serve the Confrontation Clause's "ultimate goal * * * to ensure reliability of evidence," when the Clause, as conceived by the Framers, "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

As the court of appeals noted (Pet. App. 29a-30a), the Court in *Crawford* criticized the *Roberts* test as "unpredictable." 541 U.S. at 63. But the Court did not assert that *Roberts*' unpredictability had resulted in a serious diminution in accuracy. Rather, the Court viewed *Roberts*' unpredictability as having resulted in the admission of testimonial statements that the Framers would

have regarded as "core confrontation violations." *Ibid.* "[N]othing in the *Crawford* opinion suggests that trial and appellate judges were likely to admit clearly unreliable evidence in anything but the exceptional case." Pet. App. 7a (O'Scannlain, J., dissenting from the denial of rehearing en banc).

The Court in *Crawford* also stated that the Confrontation Clause reflects the Framers' judgment that reliability "can best be determined" through cross-examination. 541 U.S. at 61. But the relevant question is not whether the Framers believed that a rule barring admission of out-of-court testimonial statements absent a prior opportunity for cross-examination would lead to greater accuracy than a rule barring admission of all hearsay statements that do not satisfy a stringent standard of reliability. *Summerlin*, 542 U.S. at 355. Nor is the question whether the former rule actually does lead to greater accuracy. *Ibid.* Rather, the question is whether application of the *Roberts* reliability rule rather than the *Crawford* cross-examination rule "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Id.* at 355-356 (internal quotation marks and citation omitted). And, for the reasons discussed above, *Roberts* does not have that effect. There is therefore no basis "to discredit the host of final convictions generated pursuant to its authority." Pet. App. 48a (Wallace, J., dissenting).

d. In reaching a contrary conclusion, the court of appeals relied on this Court's decision in *Summerlin*. Pet. App. 25a. That reliance is unfounded. In *Summerlin*, the Court held that a violation of *Ring*'s requirement that a jury rather than judge determine aggravating circumstances necessary for imposition of the death

penalty *did not* seriously diminish accuracy. The Court reasoned that even though the Framers may have believed that juries produce more accurate decisions, and even if they actually do, that does not establish that judicial factfinding seriously diminishes accuracy. *Summerlin*, 542 U.S. at 355-356. Nothing in that reasoning suggests that application of *Roberts* rather than *Crawford* seriously diminishes accuracy. If anything, *Summerlin* underscores that the adoption of a new rule that implements a procedure that the Framers viewed as promoting reliability does not automatically mean that the new rule enhances reliability to the degree required for retroactivity.

2. Crawford *Did Not Announce A Bedrock Rule Essential To A Fair Trial*

There is an additional reason that *Crawford*'s cross-examination rule does not fall within the second *Teague* exception. *Crawford* does not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks, citation, and emphasis omitted).

a. The Court has identified only one rule that has had that kind of groundbreaking effect: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Banks*, 542 U.S. at 417. Before *Gideon*, it was thought that an indigent defendant charged with a felony offense could in some cases receive a fair trial without the opportunity for assistance of appointed counsel. In *Gideon*, the Court repudiated that notion when it recognized that, absent a waiver of counsel, a felony trial conducted without a defense lawyer was an inherently unfair vehicle for adjudicating the defendant's guilt or innocence. In that way, *Gideon* altered the understanding of the procedures that

are indispensable to a fair trial; it added the right to appointed counsel to that core set of rules.

The Court has "not hesitated to hold that less sweeping and fundamental rules do not fall within *Teague*'s second exception." *Banks*, 542 U.S. at 418. For example, in *Sawyer*, the Court held that the rule in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment bars imposition of a capital sentence when a prosecutor mistakenly informs the jury that responsibility for the death penalty rests elsewhere did not fall within *Teague*'s second exception. *Caldwell* had reasoned that there was an unacceptable risk that a misleading remark about the jury's responsibility could affect the reliability of the sentencing decision. But because a defendant could already obtain relief under a pre-*Caldwell* decision by showing that a prosecutorial remark caused actual prejudice, the Court concluded that *Caldwell*'s "systemic rule enhancing reliability" was not an "absolute prerequisite to fundamental fairness." *Sawyer* v. *Smith*, 497 U.S. 227, 244 (1990) (citation omitted).

Similarly, in *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), the Court held that the rule in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), that a capital defendant has a right under the Due Process Clause to introduce evidence of his parole ineligibility to rebut a prosecutor's future-dangerousness argument did not fall within *Teague*'s second exception. The Court reasoned that "[u]nlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." 521

U.S. at 167 (internal quotation marks and citation omitted).

And in *Banks*, the Court refused to make retroactive the rule in *Mills* v. *Maryland*, 486 U.S. 367 (1988), that the Eighth Amendment prohibits capital sentencing schemes that require juries to find mitigating factors unanimously. The Court reasoned that the *Mills* rule, while designed to avoid arbitrary impositions of the death sentence, "applies fairly narrowly" and "has none of the primacy and centrality of the rule adopted in Gideon." *Banks*, 542 U.S. at 420 (citation omitted).

The lesson of *Sawyer* and *O'Dell* and *Banks* is that rules that implement bedrock constitutional guarantees are not themselves bedrock unless they approach the fundamental and sweeping importance of *Gideon*. When implementing rules produce "incremental change" and lack the "primacy and centrality" of *Gideon*, they do not fall within *Teague*'s second exception. *Banks*, 542 U.S. at 419-420 (citation omitted).

b. *Crawford*'s cross-examination rule for testimonial hearsay does not approach the fundamental and sweeping importance of *Gideon*. The presence of counsel pervasively affects all aspects of the trial, including trial strategy, the presentation of evidence, cross-examination of witnesses, the presentation of argument on legal issues that arise during the trial, and argument to the jury. A lay defendant is ill-equipped to perform those crucial tasks without the assistance of counsel, particularly when the power of the government is marshaled against him. Accordingly, when an indigent defendant facing serious criminal charges is completely denied counsel's assistance in performing those tasks, a fair trial is not possible. *United States* v. *Cronic*, 466 U.S. 648, 659 (1984).

In contrast, the *Crawford* rule is not "so fundamental and pervasive." See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). It affects only the admissibility of one limited category of evidence—testimonial hearsay. Moreover, even in that limited area, the effect of *Crawford* is only incremental. *Roberts* had already barred the admission of testimonial hearsay that had not been subjected to cross-examination unless the hearsay was so trustworthy that cross-examination would add only marginally to reliability. And a determination of trustworthiness had to be based on circumstances surrounding the making of the statement that demonstrated the statement's intrinsic trustworthiness, not on other evidence that corroborated the statement's truth. *Idaho* v. *Wright*, 497 U.S. 805, 822 (1990). In light of that substantial protection, it cannot be said that the *Crawford* rule is an "absolute prerequisite to fundamental fairness." *Sawyer*, 497 U.S. at 244 (citation omitted).

That is especially true because other procedural protections complemented the *Roberts* rule and helped to ensure that proceedings governed by *Roberts* were fundamentally fair. In trials conducted under *Roberts*, the defendant could seek to discredit an out-of-court statement admitted under *Roberts* through cross-examination of the witness who testified about that statement. The defendant could also introduce evidence of his own to challenge the veracity of the out-of-court declarant or the reliability of his statement. If the out-of-court declarant were available, the defendant could exercise his right of compulsory process to call the declarant to the stand and subject him to cross-examination. Through closing argument, the defendant's attorney could draw the jury's attention to any circumstances that might call into question the reliability of the state-

ment. And the jury could exercise its common sense to evaluate the reliability of the statement in light of all the other evidence in the case. When coupled with those complementary procedural protections, there can be no viable claim that the *Roberts* reliability test automatically results in a trial that is fundamentally unfair.

Indeed, it is particularly difficult to argue that admission of testimonial statements pursuant to the *Roberts* reliability test necessarily results in an unfair trial when this Court has held that the admission of testimony that is of doubtful reliability ordinarily does not offend Due Process. For example, in *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977), the Court held that the introduction of identification evidence of questionable reliability does not violate Due Process because "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Similarly, in *Colorado* v. *Connelly*, 479 U.S. 157, 167-168 (1986), the Court held that a confession of someone who had experienced hallucinations might be "quite unreliable," but its admission did not violate Due Process. If the admission of evidence of questionable reliability does not necessarily result in a trial that is fundamentally unfair, neither does the admission of evidence that has been found to bear adequate indicia of reliability.

c. The incremental, non-bedrock nature of *Crawford* is further demonstrated by its relationship to the body of Confrontation Clause law that preceded it. While *Crawford* overruled *Roberts* as applied to testimonial hearsay, it otherwise left undisturbed that large body of law. For example, *Crawford* did not affect the rules that govern the scope of a defendant's right to cross-examine live witnesses. See *Van Arsdall*, 475 U.S. at 679 (Con-

frontation Clause guarantees an opportunity for effective cross-examination, but it permits a court to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, witness safety, repetition, or relevance). It did not affect the rules that govern a defendant's right to confront face-to-face witnesses who appear before the trier of fact. See *Maryland* v. *Craig*, 497 U.S. 836 (1990) (a defendant has a right to face-to-face confrontation except where denial is necessary to further an important public policy and the reliability of the testimony is otherwise assured). And it did not affect the admissibility of non-testimonial out-of-court statements, such as statements made during the course of a conspiracy or statements contained in business records. See *Crawford*, 541 U.S. at 56.

Even as to testimonial statements, *Crawford* did not alter a number of well established Confrontation Clause doctrines. For example, *Crawford* did not disturb the rule that out-of-court statements may be introduced for a purpose other than establishing the truth of the matter asserted, 541 U.S. at 59 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)), the rule that an out-of-court statement not subjected to prior cross-examination may be admitted so long as the declarant appears for cross-examination at trial, *ibid.* (citing *California* v. *Green*, 399 U.S. 149, 162 (1970)), the rule allowing the admission of dying declarations, *id.* at 56 n.6 (citing *Mattox* v. *United States*, 156 U.S. 237, 243-244 (1895)), the rule that a defendant may forfeit the right to confrontation by wrongdoing, *id.* at 62 (citing *Reynolds* v. *United States*, 98 U.S. 145, 158-159 (1879)), or the rule that an error under the Confrontation Clause is subject to

harmless error review. See *Van Arsdall*, 475 U.S. at 684.

Other factors reinforce the conclusion that *Crawford* lacks bedrock status, including that it can be reconciled with the results of all prior decisions of this Court except one, *Crawford*, 541 U.S. at 58 n.8, and that it identified only four narrow categories of testimonial statements: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," and "police interrogations." *Id.* at 68. The Court's subsequent decision in *Davis* has further confined the reach of *Crawford*, holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 126 S. Ct. at 2273. Thus, while *Crawford*'s rule that testimonial hearsay is inadmissible absent a prior opportunity for cross-examination is significant, it is not the kind of bedrock rule that fundamentally alters our understanding of what is essential to the fairness of a proceeding.

d. That conclusion is fully consistent with the Court's statement in *Crawford* that the right to confrontation is "a bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. *Crawford* did not establish the right to confrontation. That guarantee was established by the Framers of the Constitution and was made applicable to the States by *Pointer* v. *Texas*, 380 U.S. 400 (1965). *Crawford* implements that bedrock guarantee. But as discussed above, such implementing rules are not themselves bedrock unless they have the kind of fundamental and sweeping importance of *Gideon*. And *Crawford* does not have that kind of fundamental and sweeping importance. While significant, *Crawford* is still simply

one of several rules that implement the right to confrontation, and its incremental protection is not indispensable to a fair trial. Accordingly, *Crawford* is not the kind of truly bedrock rule that falls within *Teague*'s second exception.[4]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] In two cases decided before *Teague*, the Court held retroactive two rules implementing the Confrontation Clause. See *Roberts* v. *Russell*, 392 U.S. 293 (1968) (holding retroactive the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), that the Confrontation Clause bars admission at a joint trial of a defendant's extrajudicial confession implicating a co-defendant); *Berger* v. *California*, 393 U.S. 314 (1969) (holding retroactive the rule in *Barber* v. *Paige*, 390 U.S. 719 (1968), that the Confrontation Clause bars admission of preliminary hearing testimony unless the government has made a good faith effort to secure the witness's presence at trial). Those decisions, however, were based on retroactivity principles that *Teague* condemned as insufficiently responsive to the serious costs to the criminal justice system caused by disturbing the finality of convictions that were obtained in accordance with then-existing law. Those decisions are therefore inapposite here.

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IN THE

Supreme Court of the United States

GLEN WHORTON, Director
Nevada Department of Corrections
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HON. EDWARD N. CAHN, HON. JOHN J. GIBBONS, HON. TIMOTHY K. LEWIS, HON. H. CURTIS MEANOR, HON. STEPHEN M. ORLOFSKY, HON. PATRICIA M. WALD AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT ON THE THIRD QUESTION PRESENTED

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INTEREST OF *AMICI CURIAE*

Amici curiae for Respondent on the third question presented are former federal judges and the Public Defender Service for the District of Columbia, which represents indigent criminal defendants.[1] As former interpreters and current practitioners of the law, we recognize the important place the Great Writ of habeas corpus holds in our society. We also acknowledge that the scope of the Writ has appropriately expanded and contracted throughout our history, in order to maintain its rightful role in our democratic system as the ultimate guarantor of liberty against governmental overreaching, to be used cautiously and as a last resort.

There is some disagreement among *Amici* about where Congress' recent attempt to contract the scope of habeas review, the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), fits within the historic ebb and flow of the Great Writ. There is also, quite frankly, disagreement among *Amici* about the proper resolution of the questions before the Court involving the retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004), on collateral review. Accordingly, we take no position on those larger questions.

On one issue currently before this Court, however, *Amici* emphatically agree. In amending 28 U.S.C. § 2254(d) so as to bar lower federal courts from granting writs of habeas corpus based on new constitutional rules of their own making, Congress neither directly stripped the Court of its historic power to apply new rules retroactively in habeas cases, nor transferred power to the fifty states to haphazardly determine whether and when state prisoners may raise federal habeas claims based on rules newly articulated and otherwise authorized by the Court.

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief.

In resolving the important issue presented in Question Three, *Amici* urge the Court to look to the plain language of § 2254(d)(1), the statutory scheme of the habeas statutes and the legislative history of AEDPA, all of which confirm that Congress, while motivated to curb abuses of the Great Writ, did not intend to alter the Court's power to apply new constitutional rules on collateral review. In short, *Amici* urge the Court to apply AEDPA as Congress wrote it, no less and no more.

STATEMENT OF THE CASE

Amici adopt Respondent's Statement of the Case.

SUMMARY OF ARGUMENT

As written, 28 U.S.C. § 2254(d)(1) reflects a clear Congressional intent to prevent the lower federal courts from relying on unsettled legal principles in resolving habeas corpus cases. The plain statutory language directs lower federal courts reviewing "any claim that was adjudicated on the merits in State court proceedings" to look only to the decisions of "the Supreme Court of the United States" in determining the governing law, and then to exercise additional restraint by looking only to the "clearly established" portions of this Court's decisions, rather than placing a gloss on those decisions or inferring governing rules from dicta. 28 U.S.C. § 2254(d)(1).

The statute's plain language notwithstanding, Petitioner and its *Amici*[2] argue that Congress had an entirely different objective when it amended 28 U.S.C. § 2254(d), namely, to rewrite the rules that govern *this Court's* ability to make its

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[2] Where specific *Amici* are not named, "Petitioner's *Amici*" refers to the two *Amici* supporting Petitioner on the third question presented. Notably, this group excludes the United States, which, despite acting as *Amicus Curiae* on behalf of Petitioner, has declined to endorse that portion of Petitioner's argument addressing Question Three.

decisions apply retroactively. This Court achieved a careful balance in applying new rules retroactively in habeas cases by identifying finality of a conviction—*i.e.*, when the time to petition for a writ of certiorari has expired—as the dividing line. Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), all new rules announced pre-finality must be given retroactive application. Under *Teague v. Lane*, 489 U.S. 288 (1989), all new rules announced post-finality are presumptively not retroactively applicable unless the new rule satisfies one of two limited exceptions at the core of the Writ. But Petitioner and its *Amici* assert that Congress, when it passed AEDPA, jettisoned this Court's carefully constructed retroactivity jurisprudence and replaced it with a new scheme. Specifically, they assert that § 2254(d)(1) precludes federal habeas relief "unless a State court decision is contrary to . . . *law that exists at the time the State court decision is made*." Petitioner's Br. at 44 (emphasis added); *accord* Criminal Justice Legal Foundation ("CJLF") *Amicus* Br. at 16; States' *Amici* Br. at 19, 22. In other words, Petitioner and its *Amici* argue AEDPA discards the finality dividing line of this Court's *Griffith-Teague* analysis, freezes the applicable law on habeas review to the law in existence at time of the controlling state court decision, and thus precludes the retroactive application of *any* new rules in habeas proceedings—both those new rules that come after the controlling state court decision but before finality, and those new rules that come after finality but are retroactively applicable under one of *Teague*'s two exceptions.

Perhaps appreciating the difficulty of advocating for a complete evisceration of this Court's powers to apply new rules retroactively in habeas proceedings, CJLF *Amicus* qualifies that federal habeas relief based on the retroactive application of new rules under *Teague's* exceptions (and presumably, by the same reasoning, under *Griffith*) survives at the margins post-AEDPA. According to CJLF *Amicus*, the Court's holdings articulating new constitutional rules may only be applied retroactively where a state prisoner is able to return to state

court to obtain a decision on the merits regarding the application of the new rule. CJLF *Amicus* Brief at 19, 21. For example, a petitioner who is able to return to State court to raise a claim under *Roper v. Simmons*, 543 U.S. 551 (2005), can proceed to federal court if that claim is erroneously denied, but a petitioner who is unable to obtain a state court ruling specifically applying *Roper* will be barred from obtaining federal habeas review of a pre-*Roper* appellate state court decision upholding his death sentence under the Eighth Amendment. Pursuant to this perverse and unfounded interpretation of § 2254(d)(1), state courts and legislatures would unilaterally control access to federal habeas relief for "new rule" claims, even though the very *raison d'etre* of federal habeas relief is to serve as a backstop when state courts are unwilling to enforce federal constitutional rights.

Petitioner's and its *Amici*'s position is unfounded. Indeed, all of the pertinent canons of statutory construction demonstrate that AEDPA no more allows the fifty states to haphazardly curtail, if not cut off entirely, access to federal habeas relief based on new rule claims under *Griffith* and *Teague*, than it directly overrules these pillars of the Court's retroactivity doctrine. Likewise, Petitioner and its *Amici* cannot persuasively argue that this Court's hands are tied because it has already endorsed Petitioner's interpretation of § 2254(d)(1). Indeed, far from giving any indication that its powers to articulate and apply new rules retroactively under *Griffith* and *Teague* may have been altered or eviscerated by AEPDA, the Court recently endorsed the whole of the *Griffith-Teague* analysis without reservation or limitation.

ARGUMENT

I. PETITIONER'S PROPOSED CONSTRUCTION OF § 2254(d)(1) WOULD COMPLETELY UPSET THE CAREFUL BALANCE THE COURT HAS STRUCK BETWEEN FUNDAMENTAL FAIRNESS AND FINALITY IN THE RETROACTIVE APPLICATION OF NEW RULES IN FEDERAL HABEAS PROCEEDINGS.

As discussed in more detail below, Petitioner's and its *Amici's* arguments cannot withstand scrutiny because their construction of the statute is unsupported by the pertinent canons of statutory construction, most importantly the plain language of § 2254(d)(1). But at the outset, it is important to examine the extent to which these arguments would uproot more than a century of settled habeas corpus law. Petitioner and its *Amici* argue that Congress, when it passed AEDPA and amended § 2254(d), either repealed in full the Court's power to apply new rules retroactively in federal habeas cases, or transferred that power to state courts and legislatures. Either of these arguments is historically jolting. Interpreting the statute as repealing the Court's power to apply its decisions retroactively in habeas cases would eviscerate at least 140 years of settled precedent, while construing the statute as completely transferring that historical power to the States would contravene the very principles that motivated the extension of federal habeas relief to state prisoners. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001) (rejecting argument that AEDPA and IIRIRA had restricted access to the Writ in the immigration context where such a conclusion "would represent a departure from historical practice" and legislation was silent).

State prisoners were given access to federal habeas relief in the Judiciary Act of 1867 precisely because of a perceived unwillingness by the states to ensure the enforcement of federal constitutional rights. *See* Act of Feb. 5, 1867, ch. 28,

14 Stat. 385. To be sure, the scope of federal court oversight has not remained fixed, but, through periods of expansion and contraction of the Great Writ, one thing has remained true: Neither this Court nor Congress has ever professed sufficient confidence in the state courts' administration of federal constitutional law such that federal habeas review was deemed unnecessary.[3]

Even in the more controversial area of the retroactive application of new rules, the Court retained from the outset the self-regulated power to adopt new rules and to apply them in habeas cases. As Justice Harlan noted in his influential concurrence in *Mackey v. United States*, 401 U.S. 667 (1971), the Great Writ has "been historically available for attacking convictions" on the grounds that "new 'substantive due process' rules . . . place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 692.

Thus, the Court in *Ex Parte Siebold* affirmed its authority to retroactively declare the federal statute under which the petitioners had been convicted unconstitutional, noting, "[i]f this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law." 100 U.S. 371, 376 (1879) (ultimately denying relief). In *Siebold*, the Court expressly affirmed its authority to review the petitioner's request for retroactive relief; sub-

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[3] Quite apart from federal habeas review, the federal court system as a whole owes its existence to a recognition that the state courts will always be primarily motivated by state concerns. *See* Alexander Hamilton, The Federalist, No. 80, at 429 (Warner ed. 1818) (advocating for conferring certain powers on a federal judiciary because "the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes"); 1 M. Farrand, The Records of the Federal Convention of 1787, at 125 (1911) (Madison's statement advocating for the creation of a federal judiciary).

sequent to *Siebold*, the Court entertained similar collateral challenges by state and federal prisoners, implicitly confirming this power. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (granting habeas relief based on retroactive application of new rule that statute could not be applied in manner that violated the Equal Protection Clause); *Crowley v. Christensen*, 137 U.S. 86 (1890) (considering request for retroactive determination that statute under which habeas petitioner was convicted was unconstitutional); *see also Baender v. Barnett*, 255 U.S. 224 (1921) (same); *In re Gregory*, 219 U.S. 210 (1911) (same); *Ex parte Yarbrough* ("The Ku Klux Cases"), 110 U.S. 651 (1884); *Ex parte Curtis*, 106 U.S. 371 (1882) (same).

With the expansion of the use of the Writ by state prisoners in the mid-twentieth century came confusion about the retroactive applicability of new rules. Out of fear that application of new rules in federal habeas proceedings would allow continuous litigation regarding the propriety of a state court conviction, a haphazard test was adopted, discouraging retroactive application of new rules at any point—whether on direct or collateral review. *Griffith*, 479 U.S. at 324-25 (discussing the problems with the retroactivity regime under *Linkletter v. Walker*, 381 U.S. 618 (1965)); *Teague*, 489 U.S. at 302-05 (same).

Justice Harlan argued against this approach, most notably in his dissent in *Desist v. United States*, 394 U.S. 244, 256-69 (1969), and his partial concurrence in *Mackey*, 401 U.S. at 675-702. Instead, he pressed for uniform retroactive application of rules announced while a case was on direct review, and presumptive nonretroactivity for rules announced after a conviction became final—after the opportunity to seek discretionary review from the Court had expired. *Mackey*, 401 U.S. at 679 (objecting to the practice of "[s]imply fishing one case from the stream of appellate review" while letting others "flow by unaffected").

Yet even as he proposed a dividing line affirming the Court's power to apply new rules retroactively to cases not-yet-final, Justice Harlan did not advocate stripping the Court entirely of its historical power to grant habeas relief based on new rules announced post-finality. *Mackey*, 401 U.S. at 692-93. Rather, Justice Harlan argued that "[t]he relevant frame of reference" for retroactivity analysis of post-finality new rules is "the purposes for which the writ of habeas corpus is made available." *Id.* at 682.

Justice Harlan identified two components of the core function of the Writ in *Mackey*, 401 U.S. at 692-93: (1) the recognition of "new substantive due process rules" determining certain acts are not punishable, exemplified by *Street v. New York*, 394 U.S. 576 (1969) (political expression); *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of materials the state deems to be "obscene"); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); and (2) the recognition of new rules of procedure that are "implicit in the concept of ordered liberty," exemplified by *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in criminal trials).

Justice Harlan's approach became the foundation of the Court's current retroactivity jurisprudence. "Finality," which attaches when the "Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires," was the key. *Clay v. United States*, 537 U.S. 522, 527 (2003); *accord Griffith*, 479 U.S. at 321 n. 6. Thus, in *Griffith*, the Court held constitutional rules issued while a criminal case was still on direct review or "nonfinal" should always apply retroactively. 479 U.S. at 328. And in *Teague*, a plurality of the Court endorsed a general principle of nonretroactivity for new rules issued after a petitioner's conviction became final, 489 U.S. at 299-310, but acknowledged two categorical

exceptions based on the Writ's core function. *Id.* at 310 ("[W]e now adopt Justice Harlan's view").

The first exception set forth in *Teague* ("Category One Rules") mirrored Justice Harlan's exception for rules that place certain acts beyond the power of the state to punish. 489 U.S. at 311. The second exception ("Category Two Rules") refined Justice Harlan's exception for "procedural" rules "that are 'implicit in the concept of ordered liberty,'" making it clear that this exception is "reserved for watershed rules of criminal procedure," *i.e.*, those rules "without which the likelihood of an accurate conviction is seriously diminished" and which implicate the fundamental fairness of the trial. *Id.* at 312-13 (*quoting Mackey*, 401 U.S. at 693).

The *Griffith-Teague* analysis—determining whether a state prisoner may get the benefit of a new rule by determining if his conviction was final when the rule was announced and if so, if one of the limited *Teague* exceptions for the most deserving cases apply—was the standard of retroactivity in cases on habeas review at the time AEDPA was adopted, *see Caspari v. Bohlen*, 510 U.S. 383 (1994) (analysis under *Teague* is a threshold inquiry on habeas review), and it remains so today.

II. AEDPA DID NOT LEGISLATIVELY OVERRULE OR TRANSFER TO THE STATES THE COURT'S TRADITIONAL POWER TO APPLY NEW RULES RETROACTIVELY IN HABEAS CASES.

Against this historical backdrop, the Court must analyze the arguments made by Petitioner and its *Amici* that AEDPA either (1) entirely eliminated the Court's power to apply new rules retroactively to cases in which the operative appellate state court decision predated the Court's new rule, *see* Petitioner's Br. at 41-47, States' *Amici* Br. at 19-25, or (2) transferred to state courts and legislatures the unilateral power

to determine when a state prisoner may raise a claim in federal court based on a newly articulated rule by the Supreme Court. *See* CJLF *Amicus* Br. at 19, 21. Because access to the Great Writ is considered a cornerstone of our liberty, the Court has been understandably suspicious of arguments that its habeas powers have been legislatively limited. At a minimum, the Court repeatedly has required "an unmistakably clear statement" from Congress that this is so. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006); *see also St. Cyr*, 533 U.S. at 298 ("a clear statement" is required "to repeal habeas jurisdiction"); *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996) (Court retains original jurisdiction to hear habeas petitions where AEDPA does not expressly strip power); *Ex parte Yerger*, 75 U.S. 85, 102 (1869) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law").

No such "unmistakably clear statement" appears on the face of § 2254(d)(1). Nothing in the statutory language suggests that Congress meant to divest the Court of its long-standing power to apply retroactively new rules on collateral review when it deems it appropriate to do so. In fact, the proposed construction of the statute by Petitioner and its *Amici* not only contravenes the statute's plain text, it also contravenes the structure of the habeas statutes, is unsupported by the legislative history of AEDPA, and potentially runs afoul of the Anti-Suspension Clause of the Constitution.

A. The Plain Language of § 2254(d) Preserves Intact the Court's Powers To Apply New Rules Retroactively.

The most fundamental failing of Petitioner's and its *Amici's* arguments is their lack of support from the statute's plain language. Section 2254(d) precludes habeas relief unless a state prisoner can demonstrate the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It is Petitioner's burden to show this language diminishes the Court's powers to apply new rules in federal habeas proceedings—not Respondent's burden to demonstrate this language preserves the Court's pre-existing and long-standing power. *See Hamdan*, 126 S. Ct. at 2764; *see also St. Cyr*, 533 U.S. at 298; *but see* Petitioner's Br. at 45 (asserting "[t]here is no evidence" that § 2254(d)(1) meant to adopt *Teague's* exceptions). Petitioner cannot carry this burden where, by its plain text, § 2254(d)(1) divests only *the lower federal courts* of power to issue a writ of habeas corpus based on the application of rules newly created by those courts, and leaves unchanged the Court's traditional power in habeas cases to apply new rules retroactively.

Prior to AEDPA, no substantive limits constrained the lower federal courts from granting habeas relief so long as these courts determined that the rule that they wished to apply was "dictated by precedent," *Teague*, 489 U.S. at 301– a determination these courts could make by looking to their own Circuit precedent, without regard to what the Court had said (or not said) on the subject. *See, e.g., Bell v. Hill*, 190 F.3d 1089, 1091-92 (9th Cir. 1999) (affirming reliance on circuit precedent to determine that rule not new under *Teague*); *see also Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J. concurring) (criticizing this approach). Thus, the constitutional validity of state court convictions to some degree became a function of what the lower federal courts thought the Constitution required, rather than what this Court had clearly mandated.

Section 2254(d)(1) resolved this problem by mandating that this Court is the sole arbiter of what is the applicable law on collateral review. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence"). Significantly,

§ 2254(d)(1) imposes two requirements on lower federal courts: (1) they must look to Supreme Court precedent—"law [that is] determined by the Supreme Court," and (2) they may only grant relief if the sought-after rule is "clearly established" by that precedent. The latter constraint makes clear the lower federal courts may not circumvent the limits of § 2254(d)(1) by determining that new rules have been suggested or implied by this Court's precedents. Rather, the lower federal courts reviewing a petition for a writ of habeas corpus are bound to apply only the holdings of this Court.

While § 2254(d)(1) imposes limits on the lower federal courts, it does not impose any limitation on how this Court operates. It addresses neither explicitly (as it must for Petitioner's argument to prevail) nor implicitly how or when the Court may determine what is "clearly established Federal law." Much less does it impinge upon the Court's powers under *Griffith* and *Teague*—powers that were "clearly established" within the meaning of § 2254(d)(1) at the time AEDPA was passed, *see* Point I *supra*—to adopt and make retroactive new rules in habeas cases.

Petitioner repeatedly asserts, however, that "[u]nder the plain meaning of the terms [of § 2254(d)(1)] habeas corpus relief cannot be granted unless a State court decision is contrary to . . . *law that exists at the time the State court decision is made.*" Petitioner's Br. at 44 (emphasis added); *see also id.* at 46. As a preliminary matter, it is important to note how Petitioner's interpretation of § 2254(d)(1) would radically restructure habeas litigation—especially because Petitioner and its *Amici* do not appear to appreciate the consequences of their arguments. Under Petitioner's read of § 2254(d)(1), this Court would be stripped of (1) its historic powers under *Teague* to apply retroactively a new rule issued after a habeas petitioner's conviction became final; and (2) a portion of its powers under *Griffith*, namely, the power to give a habeas petitioner the benefit of a rule issued after the

controlling appellate state court decision but before his conviction became final.[4]

CJLF *Amicus* qualifies that this Court's power to order federal habeas relief based on the retroactive application of new rules under *Teague*[5] is not entirely eliminated by § 2254(d)(1). According to CJLF *Amicus*, this power survives where a state prisoner has, after the announcement of the new rule, been able to return to state court and there obtain a decision on the merits regarding the application of the new rule; this new decision, if erroneous, then will be "contrary to or an unreasonable application of" decisional law from this Court "that exists at the time the State court decision is made." CJLF *Amicus* Brief at 19, 21. CJLF *Amicus'* attempt at a more nuanced read of § 2254(d)(1) is simply window dressing. It renders the statute's jurisdiction-stripping impact for "new rule" claims haphazard, as opposed to categorical, depending on the procedural hurdles to state collateral relief in the fifty states.[6]

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[4] The Court would still have the power under *Griffith* to apply new rules to cases on direct review, but its power to instruct the lower courts to apply that new rule to *all* similarly situated cases—those on direct review *and* those cases on habeas seeking application of a rule announced in the post-appellate decision-but-pre-finality window—would be curtailed. *But see Griffith*, 479 U.S. at 323 ("we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final."). This latter group potentially constitutes a large number of cases. In many states the operative appellate decision is issued by an intermediate appellate court, but the conviction does not become final until the time for seeking discretionary review from the state supreme court and this Court has expired. At least until now, habeas has been a backstop to ensure the proper application of new rules in these cases. *See* Point II.D, *infra*.

[5] As noted above, Petitioner and its *Amici* nowhere acknowledge the *Griffith* implications of their proposed interpretation of § 2254(d)(1).

[6] CJLF *Amicus* also submits that there will be no bar to this Court's exercise of its powers under *Teague* when a state prisoner has fully ex-

Even this distinction is likely shortlived, however, because CJLF *Amicus'* read of the statute creates an incentive for states to curtail or eliminate entirely state habeas review for new rule claims. In so doing, the states would cut off access to federal habeas review and promote the finality of convictions their appellate courts have already affirmed. Indeed, when afforded an opportunity to contract the rights of state prisoners to challenge their convictions collaterally—namely, when this Court has imposed limits on the Writ—state courts and legislatures have embraced the contraction of avenues to collateral relief.[7] The perverse incentive structure created by CJLF *Amicus'* unfounded interpretation of § 2254(d)(1) must be contrasted with Respondent's plain language interpretation of the statute, which leaves this Court's powers to apply new

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hausted his constitutional claims, but no state court has ever ruled on the merits of these claims. *See* CJLF *Amicus* Br. at 19. This scenario, however, only renders state prisoners' access to federal habeas relief based on new rule claims even more random and arbitrary.

[7] *See, e.g., Valenzuela v. Newsome*, 325 S.E.2d 370, 372-74 (Ga. 1985) (changing, in the wake of *Wainwright v. Sykes*, 433 U.S. 72 (1977), circumstances under which failure to make a contemporaneous objection constitutes a waiver); *Michigan v. Reed*, 535 N.W.2d 496, 499-501 (Mich. 1995) (noting Michigan's post-appeal relief statute is based on the federal habeas corpus statute and adopting the *Sykes* "cause and prejudice" standard); *Michigan v. Jackson*, 633 N.W.2d 825, 830 (Mich. 2001) (Michigan post-appeal relief statute imposes new limits on delayed motions for new trial and "repeated filings of such motions without any limitation period"); *Evans v. Mississippi*, 441 So.2d 520, 524, 533 (Miss. 1984) (Robertson, J. in dissent) (Objecting to over-reliance on *Sykes*, and *Engle v. Isaac*, 456 U.S. 107 (1982), and consequent evisceration of Mississippi's post-conviction means to relief, the writ of *coram nobis*: "Our eye must be affixed to justice, not slanted toward *Wainwright v. Sykes* . . . and *Engle v. Isaac*"); *Ex parte Ramirez*, 577 S.W.2d 261, 264 (Tex. Crim. App. 1979) (Recommending "to the bench and bar the discussion of the policy basis for the contemporaneous objection rule as discussed in *Wainwright v. Sykes* . . ." because federal rules regarding procedural default are "persuasive in determining what [the Texas Court of Criminal Appeals] will review . . .").

rules retroactively unchanged and maintains intact state courts' incentive to afford merits collateral review of "new rule" claims, thereby triggering federal court deference to the state courts' merits ruling.[8]

Given the radical changes that would flow from the interpretation of § 2254(d)(1) advocated by Petitioner and its *Amici*, Congress would have been required to use "unmistakably clear" language to endorse such a change and so to limit the Court's habeas jurisdiction. *Hamdan*, 126 S. Ct. at 2764. But no such clear language is found in § 2254(d)(1); indeed Petitioner and its *Amici* cannot even argue the statute freezes the applicable law for state prisoners on federal habeas review to law "that exists at the time the State court decision is made," without adding language that nowhere appears in the statute.[9]

Looking at the actual language of the statute, "clearly established Federal law, as determined by the Supreme Court of the United States," it is apparent the whole of Petitioner's plain language argument rests on a single word: "estab-

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[8] CJLF *Amicus* cites decisions following *Atkins v. Virginia*, 536 U.S. 304 (2002) as proof that state courts can be trusted with the administration of federal constitutional rights. *See* CJLF *Amicus* Br. at 21 & Appendix. But CJLF *Amicus* fails to appreciate the true import of its own argument. There is no guarantee that state courts will be so respectful of the Court's articulation of new constitutional rules in a world where the states know there is no recourse when they refuse to apply the Court's new rules retroactively. In other words, CJLF Amicus' appendix of post-*Atkins* cases simply confirms that states are more likely to comply with the Court's constitutional commands when they know that inaction or indifference will prompt federal court intervention.

[9] This language appears to be derived from the Court's discrete discussions of the meaning of § 2254(d)(1) in *Williams*, 529 U.S. at 412, and *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). But, as discussed below, *see* Point III *infra*, in neither case did the Court have a reason to question the continued viability of the *Griffith-Teague* analysis of new rules in habeas proceedings, nor did it do so.

lished." Petitioner particularly notes Congress used "the term 'established' in the past tense as a participle," thereby "*indicat[ing]* the intent to measure the correctness of a State court's decision against existing law rather than future law." Petitioner's Br. at 44 (emphasis added); *see also id.* at 43 ("this text . . . *suggests*. . . that under § 2254(d)(1) [C]ongress did not mean to adopt the *Teague* exceptions into the 'clearly established Federal law' language") (emphasis added). But, as explained above, the requirement that a sought-after rule be "clearly established" is properly read as a limitation on the power of the lower federal courts to infer new rules from the Court's dicta; it does not restrict the Court's power to articulate new rules and to apply them retroactively when it deems it appropriate to do so.

In any event, Petitioner's own hesitant language effectively concedes the weakness of its plain-text reading of § 2254(d)(1). Supposed congressional "suggestions" and "indications," Petitioner's Br. at 43, 44, are insufficient when jurisdiction-stripping legislation regarding the Great Writ is at issue. The Court has plainly stated, "[r]epeals by implication are not favored." *Yerger*, 75 U.S. at 105; *see also*, *Felker*, 518 U.S. at 660 (rejecting a jurisdiction-stripping interpretation of 28 U.S.C. § 2244(b)(3)(E)). In the absence of a "clear, unambiguous, and express statement" that Congress meant to repeal either the Court's power under *Teague* to apply retroactively a new rule issued after a habeas petitioner's conviction became final, or its power under *Griffith* to give a habeas petitioner the benefit of a rule announced after the controlling appellate state court decision but before his conviction became final, these aims cannot be attributed to § 2254(d)(1). *St. Cyr*, 533 U.S. at 299 (Congress must articulate specific and unambiguous statutory directives to effect a repeal of habeas corpus jurisdiction").

B. The Structure of the Habeas Statutes Confirms Congress Intended to Preserve the Court's Powers to Apply New Rules Retroactively.

The structure of the habeas statutes also confirms that Congress meant, in § 2254(d)(1), to preserve—not to legislatively abrogate, either categorically or haphazardly—the Court's traditional powers to apply new rules retroactively in habeas cases under *Teague* and *Griffith*. *See Tyler v. Cain*, 533 U.S. 656, 662 (2001) ("we interpret the words [of a statute] in their context with a view to their place in the overall statutory scheme.").

Section 2254(d)(1) delimits the grounds on which a state prisoner may obtain relief from the federal Courts by expressly directing that a state prisoner's "application for a writ of habeas corpus . . . *shall not be granted* . . . *unless*" it meets the requirements of § 2254(d). But before a state prisoner may obtain merits review, he must survive a number of procedural hurdles—time limitations on filing, exhaustion requirements, and obligations to develop an adequate factual foundation for the claim—contained in other provisions of Chapters 153 and 154 of the habeas statutes.

Notably, four of these gate-keeping provisions contain safety valves precisely to ensure that they will not bar claims by state prisoners based on the application of new rules deemed by the Court to be retroactively applicable.[10] Section 2244(d) imposes a one-year statute of limitations on all claims raised under § 2254(d), running from the date the state judgment becomes final, but extends that time if "the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). Similarly, § 2254(e)(2)(A)(i) pro-

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[10] Two more references to the retroactive application of new rules appear in similar gate-keeping provisions in 28 U.S.C. § 2255 governing collateral relief for federal prisoners. *See* 28 U.S.C. § 2255(5) & (8).

vides a state prisoner cannot prevail on a claim raised under § 2254(d) if he has failed to develop the evidentiary basis for his claim, but then exempts from this bar claims that rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). And § 2244(b)(2)(A) provides a second or successive petition filed under § 2254(d)(1) must be dismissed unless the state prisoner shows, "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2244(b)(2)(A). Lastly, 28 U.S.C. § 2264(a)(2) imposes an additional exhaustion requirement on the consideration of habeas claims under § 2254 by a state prisoners under a capital sentence (*see* 28 U.S.C. § 2261), but makes an exception where the failure to exhaust is "the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable." 28 U.S.C. § 2264(a)(2).

Modification of these gate-keeping provisions for claims based on newly recognized rules confirms Congress' commitment to preserving the Court's power to determine whether retroactive application of a new rule is warranted when reviewing a petition on the merits under § 2254(d)(1). By taking pains at every turn to ensure its otherwise strict standards would not impede obtaining merits review of claims based on new rules, Congress conveyed its respect for the Court's efforts to construct a workable retroactivity doctrine that achieves a balance between the sometimes competing concerns of fundamental fairness, comity, and judicial economy. Likewise, by ensuring that these gatekeeping provisions do not bar "new rule" claims, Congress indicated that it anticipates the Court will continue to apply new rules retroactively in habeas proceedings pursuant to its "clearly established" retroactivity jurisprudence.

Petitioner wholly ignores these gate-keeping provisions and thus cannot explain why, if not to ensure that the Court could under *Teague* apply (or under *Griffith* instruct lower courts to apply) new rules retroactively in habeas cases, Congress built into the structure of the habeas statutes safety-valve provisions to ensure that state prisoners can obtain habeas relief based on a new rule articulated by the Court. For their part, Petitioner's *Amici* attempt to argue that the failure of Congress to include any express reference in § 2254(d)(1), as it did in the gate-keeping provisions, to the Court's continued power to apply new rules retroactively signals that Congress wanted to eliminate this power. States' *Amici* Br. at 21-22; CJLF *Amicus* Br. at 19. This argument is unpersuasive.

As a preliminary matter, Petitioner's *Amici* have it backwards: because the Court already possessed this power, *see* Point I., *supra*, it was incumbent upon Congress to make its intentions crystal clear if it intended to eliminate this power. *See Hamdan*, 126 S. Ct. at 2764, 2766 n. 7 (requiring an "unmistakably clear statement" that jurisdiction was being stripped and rejecting the argument that "the absence of an express provision reserving [preexisting habeas] jurisdiction" is dispositive); *see also* Point II.A, *supra*.

Moreover, Petitioner's *Amici's* arguments ignore critical differences between § 2254(d)(1) and the gatekeeping statutes. There is no reason to read anything into the absence from § 2254(d)(1) language appearing in the gatekeeping statutes referencing this Court's power to make new rules retroactively applicable. Section 2254(d)(1) and the gatekeeping statutes are related but different types of statutory provisions. Section 2254(d)(1) limits substantive grounds for federal habeas relief by imposing a strict standard of review on state prisoner petitions; the gatekeeping statutes catalogue situations where state prisoners can move forward procedurally to obtain merits review under § 2254(d)(1). In the

former instance, there is no need to mention claims based on new rules if Congress had no intention of denying relief on such grounds; in the latter, express reference is required to make clear certain procedural barriers are removed where habeas relief is based on a new rule made retroactively applicable by this Court. *See Clay*, 537 U.S. at 528-31 (explaining that the difference in language between §§ 2254 and 2255 was attributable to other concerns and that, notwithstanding this difference, "final" had the same meaning).

C. The Legislative History of AEDPA Confirms Congress Intended to Preserve the Court's Power to Apply New Rules Retroactively.

The legislative history of AEDPA bolsters the plain-text and schematic interpretation of § 2254(d)(1), confirming Congress had no intent to strip, categorically or haphazardly, the Court of its "clearly established" authority to apply new rules retroactively on collateral review. *See Hamdan*, 126 S. Ct. at 2764, 2766 (legislative history contradicted government's jurisdiction-stripping argument); *Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006) (plain reading of statute consistent with legislative history). Even as he promoted the goal of curtailing abuses of the writ, Senator Hatch, one of the principal sponsors of AEDPA, endorsed without reservation this Court's power to authorize habeas relief based on the retroactive application of new rules:

> [U]nder our habeas corpus reform provisions . . . people's rights will be protected. There will be a full right of appeal all the way up the State courts, from the lowest court to the Supreme Court of the State. There will be a full right of appeal all the way up the Federal courts, from Federal court to district court to the Supreme Court of the United States, and their rights will be protected. But that is all they are going to have, unless they can show newly discovered evidence of innocence or *unless*

> *the Supreme Court applies retroactively future cases to these problems.*

141 Cong. Rec. S7479-03, S7481 (May 25, 1995) (statement of Sen. Hatch) (emphasis added).

Ignoring this express statement of intent by Senator Hatch, Petitioner and its *Amici* fail to engage in any analysis of the legislative history of AEDPA other than to vaguely assert that AEDPA was meant "to effect change in habeas practice, rather than merely to codify existing law." Petitioner's Br. at 44. It is undisputed that Congress, in passing AEDPA, sought to address what it perceived to be abuses of the Writ. But there is no evidence in the legislative history that Congress sought to do so by limiting *this* Court's powers in the way Petitioner and its *Amici* propose. To the contrary, Congress expressly designated this Court the sole arbiter of applicable federal law in habeas proceedings. *Williams*, 529 U.S. at 412.

Petitioner and its *Amici's* proposed read of § 2254(d)(1) is out of step even with the most radical proposals for habeas reform considered and rejected by Congress when it passed AEDPA. The legislative history of AEDPA reflects that there was a failed movement to impose new jurisdictional limits on federal habeas relief unless "the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." *See* 141 Cong. Rec. S7803-01, S7829 (June 7, 1995) ("Kyl Amendment"); *id.* at S7829-30, S7833 (Senator Kyl argues in favor of curtailing federal habeas review *if* state habeas review is provided). But Petitioner and its *Amici's* read of AEDPA would actually authorize and provide states with the incentive to provide "inadequate" access to state collateral review, at least for "new rule" claims, in order to cut off federal habeas review. Petitioner's proposed regime goes well beyond a rule of deference. *See Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997); *see also* CJLF *Amicus* Br. at 14. It is a jurisdiction-stripping measure

that even the most avid congressional proponents of limiting access to the Great Writ never advocated.[11]

Finally, Petitioner and its *Amici* can offer no evidence that this Court's exercise of its power to make new rules retroactive under *Teague* or *Griffith* was ever a motivating factor in the passage of AEDPA. This is hardly surprising. The *Teague* exceptions are sufficiently narrow to discourage controversial overuse. Since *Teague*, the Court has determined in only a handful of cases that certain conduct is beyond the power of the state to punish at all or punish in a certain way, *see* Point II.D, *infra*—rulings that are retroactively applicable under *Teague's* Category One exception. And the Court has yet to invoke *Teague's* Category Two exception for watershed rules of criminal procedure. Similarly, the proposition that the Court may, under *Griffith*, instruct lower courts to give the benefit of new rules to habeas petitioners who stand in the same shoes as defendants still pursuing direct appellate review—*i.e.*, those petitioners who seek the application of a rule announced after the issuance of the controlling appellate state court decision but before their convictions became final—is a matter of fundamental fairness and hardly likely to raise congressional objections.

D. The Doctrine of Constitutional Doubt Militates in Favor of the Court's Continuing Power to Apply New Rules Retroactively.

Even if Petitioner and its *Amici* could overcome the hurdles of the plain language of the § 2254(d)(1), the structure of the

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[11] Certainly the Senators who successfully opposed the Kyl Amendment would not endorse Petitioner and its *Amici's* proposed read of § 2254(d)(1). *See* 141 Cong. Rec. S7803-01, at S7832 (Senator Biden voices opposition to the Kyl Amendment because divesting federal courts of their habeas powers "creates another problem. . . . [b]ad decisions made by State courts" which prevent "people who deserve another trial" from getting one); *id.* at S7834 (Senator Specter emphasizes the important role federal courts play in protecting federal constitutional rights).

habeas statutes, and the legislative history of AEDPA and could demonstrate that their alternate reading of § 2254(d)(1) has some foundation, rejection of Petitioner's position would nonetheless be warranted to avoid construing the statute in a constitutionally questionable manner.

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible," the Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299-300 (internal quotation and citation omitted); *see also, Hamdan*, 126 S. Ct. at 2764 (avoiding constitutional problems with statute by relying on "[o]rdinary principles of statutory construction"). Petitioner's and its *Amici's* interpretation of the statute raises potentially serious constitutional problems under the Anti-Suspension Clause of the Constitution, *see* U.S. Const. art. I § 9[12]—which the Court has assumed protects "the writ as it exists today." *Felker*, 518 U.S. at 664. Specifically, under Petitioner's and its *Amici's* interpretation of § 2254(d)(1), Congress cut off access to the Writ, either categorically or haphazardly, for two special classes of individuals this Court had previously determined must have access to federal habeas relief to ensure fundamental fairness.

First, petitioners seeking the benefit of a new rule under one of *Teague's* two traditional exceptions to its general nonretroactivity rule would be denied uniform access, if not access in full, to collateral review. These narrow exceptions are limited to the most deserving cases that exemplify the core function of the Writ. *Teague's* Category Two exception for "watershed procedural rules" is a power the Court has yet to invoke but retains for exceptional cases to ensure that there

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[12] Article I, section 9 of the U.S. Constitution reads, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

is a floor of fundamental fairness in our criminal justice system. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (all criminal defendants facing the possibility of imprisonment have the right to counsel); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (criminal statutes may not be arbitrarily applied to persecute one group).

Likewise, *Teague's* Category One exceptions serve to establish a floor below which the state may not descend by prohibiting punishment of individuals for actions, or status, which have ceased to be punishable crimes. In these cases as well, the Court has exercised its power to grant retroactive relief sparingly: for example, to invalidate prohibitions regarding certain educational efforts;[13] to invalidate prohibitions regarding various modes of political expression;[14] to invalidate prohibitions regarding certain private acts within the sphere of the home;[15] or to invalidate punishment related to the status of having an illness.[16] The Court has been similarly conservative in its holdings limiting *how* certain

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[13] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (teaching school children in a language other than English); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (sending one's child to private religious school).

[14] *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag); *Street v. New York*, 394 U.S. 576 (1969) (opining that, if the government refused to protect civil rights workers in the South, "We don't need no damn flag"); *Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket bearing "Fuck the Draft").

[15] *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the use of contraception); *Stanley v. Georgia*, 394 U.S. 557 (1969) (the private possession of materials the state deems to be "obscene"); *Lawrence v. Texas*, 539 U.S. 558 (2003) (private sexual conduct between consenting adults of the same gender).

[16] *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (narcotic addiction).

classes of criminal defendants may be punished.[17] Even so, under Petitioner's interpretation of § 2254(d)(1), AEDPA would prohibit the Court from mandating the uniform retroactive application of even these sorts of new rules.

In addition to the limited class of individuals who might otherwise obtain the retroactive application of a new rule under one of the two *Teague* exceptions, Petitioner would curtail habeas review for all state prisoners seeking the benefit of any rule articulated by the Court after the operative state appellate court decision is rendered but before their convictions become "final" as defined by this Court. *Clay* 537 U.S. at 527 (2003); *Griffith*, 479 U.S. at 321 n. 6. Although neither Petitioner nor its *Amici* discusses this consequence, their proposed interpretation of § 2254(d)(1) strikes directly at the foundation of the Court's retroactivity jurisprudence where the Court carefully identified "finality" as the dividing line between automatic retroactive application of a new rule and presumptive inapplicability. *See* Point I *supra*.

This dividing line of finality was adopted precisely to ensure that the Court did not unfairly "fish[] one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permit[] a stream of similar cases to flow by unaffected by that new rule." *Griffith*, 479 US at 323 (quoting, *Mackey*, 401 U.S. at 679) (Harlan, J. concurring). Moreover, recognizing"[a]s a practical matter," this Court "cannot hear each case pending on direct review and apply [a newly created] rule," the Court "fulfill[ed] [its] judicial responsibility" and addressed fairness concerns about the disparate application of new rules "by instructing the lower courts to apply the new rule retro-

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[17] *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942) (persons who are deemed "habitual criminals" may not be sterilized by the state); *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons who are mentally retarded may not be executed for their crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles may not be executed for their crimes).

actively to cases not yet final." *Griffith*, 479 U.S. at 323. In *Powell v. Nevada*, 511 U.S. 79, 84 (1994), the Court made clear the *Griffith* finality rule was one of constitutional dimension. *Id.*

By constricting (if not cutting off entirely) habeas relief for a state prisoner who seeks the benefit of a Supreme Court ruling decided *after* the operative state court decision but *before* the time for the Court's review has expired, all the fairness concerns previously resolved by the Court in *Griffith* will come again to the fore. State prisoners whose convictions are not yet final when a new rule is announced and who are able to obtain rehearing from an intermediate appellate court or discretionary review from their state supreme court after the issuance of a new rule will get the benefit of it. Those who cannot will have to look to state collateral proceedings, but state courts and legislatures may or may not permit the prerequisite merits review of such "new rule" claims. If they do not federal habeas relief will be foreclosed. As a consequence, the haphazard application of new rules that the Court's carefully crafted retroactivity jurisprudence was designed to cure will once again become the norm. *But see Griffith*, 479 U.S. at 323 ("the integrity of judicial review requires" application of new rule "to all similar cases pending on direct review"); *Teague*, 489 U.S. at 304-05, 308-10 (reaffirming dividing line of *Griffith* rule).

To neutralize the impact of Petitioner and its *Amici's* read of § 2254(d)(1) and avoid the result where some state prisoners with *Teague* exception and *Griffith* claims are "fished out of the stream," but others are not, the Court could attempt extraordinary measures. It could open wide its doors to petitions for original writs of habeas corpus, assuming that these writs are not governed by the same strictures imposed by § 2254(d). *See Felker*, 518 U.S. at 660-61 (affirming the Court's original jurisdiction to hear habeas petitions post-AEDPA). Additionally, to obviate *Griffith* claims on habeas

review, the Court could expand its docket and try to grant direct review in every case where the Petitioner seeks the benefit of a newly articulated rule (perhaps even amending its filing rules for cases where a new rule is articulated in the days before the deadline to petition for a writ of certiorari expires and finality attaches).

This regime would be burdensome, however, even if the Court were only to issue orders granting review, vacating the state court decision, and remanding for further consideration in light of the new rule because, in a world where habeas petitioners no longer enjoy the benefit of *Griffith*, the number of petitions for certiorari likely will increase.[18] Moreover, whether it expands its own habeas review or direct review, the Court would still expend considerable resources engaged in the sort of error correction better suited to habeas review by lower federal courts. *See* 141 Cong. Rec. S7803-01, at S7835 (Senator Biden objects to Senator Kyl's argument that direct review by the Supreme Court is all the federal court review that is needed in our criminal justice system: "It is not the Supreme Court's job to take a detailed look at every State court conviction. It is the Supreme Court's job to decide weighty issues of Federal [C]onstitutional law. That is why we have [lower] Federal courts . . . [to be] safeguarders of Federal law").

No extraordinary measures need be taken by the Court and constitutional questions may be avoided, however, if Petitioner's proposed interpretation of § 2254(d)(1) is rejected, and the statute is instead interpreted in conformance with its text, the structure of the habeas statutes, and AEDPA's legislative history. Thus, the very "fact that this Court would be required

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[18] Certainly, under the Court's current finality jurisprudence it is assumed that not everyone who is entitled to the benefit of a newly articulated rule under *Griffith* is seeking this Court's direct review—because a conviction is not final until "the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527; *accord Griffith*, 479 U.S. at 321 n. 6.

to answer the difficult question of what the Suspension Clause protects is in and of itself a reason" to reject Petitioner's interpretation of § 2254(d)(1). *St. Cyr*, 533 U.S. at 301 n. 13; *accord Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (because Congress is presumed to legislate within legal limits, courts are charged with avoiding an interpretation of a statute that would render it unconstitutional or would cast grave doubt upon its constitutionality).

III. THE COURT HAS GIVEN NO INDICATION THAT ITS POWER TO APPLY NEW RULES RETROACTIVELY WAS DIMINISHED OR ELIMINATED BY § 2254(d)(1).

Although the Court has decided a number of cases post-AEDPA that have touched on the language of § 2554(d)(1) and the retroactive application of new rules, it has yet to resolve conclusively the issue presented in Question Three—as its grant of certiorari in this case confirms. Nonetheless Petitioner incorrectly argues that two of the Court's post-AEDPA precedents provide "dispositive" support for its jurisdiction-stripping interpretation of § 2254(d)(1). Petitioner's Br. at 46.

Petitioner asserts that this Court's opinions in *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2003) provide "dispositive" evidence that § 2254(d)(1) freezes applicable habeas law to the decisional law from this Court in existence "at the time the State court decision was made." Petitioner's Br. at 43, 46-47. But in both *Andrade* and *Williams*, the applicable law—what constitutes ineffective assistance of counsel and the gross disproportionality principle in sentencing, respectively—was not "new." Thus, in neither case did the Court have reason to analyze how, if at all, § 2254(d) impacts its power to apply new rules retroactively under the *Teague* exceptions (or within the *Griffith* timeframe). Nor did the Court do so. *See Williams*, 529 U.S. at 412 (noting

only "whatever would qualify as an old rule" under *Teague* "will constitute 'clearly established Federal law' . . . under § 2254(d)(1)" "[w]ith one caveat," namely, that the only source of "clearly established Federal law" is now the Supreme Court); *Andrade*, 538 U.S. at 72 (no express reference to *Teague*; observing only that "[i]n *most* situations, the task of determining what we have clearly established will be straightforward") (emphasis added).

Indeed, to the extent the Court wishes to look back to its nonbinding precedent, there are a number of cases in which it has referenced its powers under *Teague* to apply new rules retroactively in habeas cases without any indication that this power has been severely curtailed if not entirely eviscerated by AEDPA.[19] Most notably, in *Horn v. Banks (Banks I)*, 536 U.S. 266 (2002), *rev'd post-remand, Beard v. Banks (Banks II)*, 542 U.S. 406 (2006), the Court endorsed the whole of the *Griffith-Teague* retroactivity analysis for habeas cases without any mention of the supposed limits imposed by § 2254(d)(1).

Specifically, the Court held in *Banks I* that § 2254(d)(1) does not relieve lower federal courts of conducting a *Teague* analysis as a threshold matter. *Banks I*, 536 U.S. at 271. And in *Banks* II, the Court reversed again, holding the new rule in question did not satisfy either of the *Teague* exceptions for retroactive application. *Banks II*, 542 U.S. at 420. Of critical

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[19] *See, e.g., Day v. McDonough*, 126 S. Ct. 1675, 1684, 1681-82 (2006) (federal court could raise sua sponte the issue of noncompliance with one-year statute of limitations even where the state had failed to raise the issue, so as to conform to "other threshold constraints on federal habeas petitioners" including the "nonretroactivity rule announced in *Teague v. Lane*."); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (dismissing Writ as improvidently granted, *inter alia*, because it appeared that the petitioner sought the application of a new rule under *Teague* and thus, "[b]efore relief could be granted. . . we would be obliged to decide whether or how . . . [this new rule] bears on our ordinary 'new rule' jurisprudence").

importance here, the Court rejected petitioner's argument that the date of finality should be moved to render rules announced during the pendency of state collateral proceedings "old" and thus not subject to the limits of *Teague*. Instead, the Court reaffirmed the *Griffith* rule: "State convictions are final for the purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." 541 U.S. at 411 (internal quotation and citation omitted). It is difficult, if not impossible, to square the Court's adherence to the *Griffith-Teague* analysis with Petitioner's assertion that this analysis did not survive the passage of AEDPA.

CONCLUSION

For the reasons set forth above, the Court should hold that 28 U.S.C. § 2254(d)(1), as amended by AEDPA, does not abrogate the Court's authority to make new rules retroactively applicable in state prisoner habeas cases.

Respectfully submitted,

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Supreme Court, U.S.
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No. 05-595

IN THE

Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,

Petitioner,

vs.

MARVIN HOWARD BOCKTING,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did *Crawford* v. *Washington*, which overruled *Ohio* v. *Roberts*, create a "new rule" within the meaning of *Teague* v. *Lane*?

2. If so, does *Crawford* qualify for the second exception to *Teague*'s rule of nonretroactivity on habeas?

3. When a state court has faithfully and reasonably applied the precedents of this Court in effect at the time of its decision, can that decision later become "a decision that was contrary to . . . clearly established Federal law" within the meaning of 28 U. S. C. § 2254(d) when those precedents are later overruled?

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Mackey v. United States, 401 U. S. 667, 91 S. Ct. 1160,
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McCleskey v. Zant, 499 U. S. 467, 111 S. Ct. 1454,
113 L. Ed. 2d 517 (1991) 13

Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265,
67 L. Ed. 543 (1923) 12

Muhleisen v. Ieyoub, 168 F. 3d 840 (CA5 1999) 17

O'Dell v. Netherland, 521 U. S. 151, 117 S. Ct. 1969,
138 L. Ed. 2d 351 (1997) 10

Ohio v. Roberts, 448 U. S. 56, 100 S. Ct. 2531,
65 L. Ed. 2d 597 (1980) 3, 6

Reno v. Flores, 507 U. S. 292, 113 S. Ct. 1439,
123 L. Ed. 2d 1 (1993) 19, 20

Ring v. Arizona, 536 U. S. 584, 122 S. Ct. 2428,
153 L. Ed. 2d 556 (2002) 7

Rompilla v. Beard, 545 U. S. 374, 125 S. Ct. 2456,
162 L. Ed. 2d 360 (2005) 14

Rose v. Lundy, 455 U. S. 509, 102 S. Ct. 1198,
71 L. Ed. 2d 379 (1982) 9

Saffle v. Parks, 494 U. S. 484, 110 S. Ct. 1257,
108 L. Ed. 2d 415 (1990) 7, 9, 13

Sanchez-Llamas v. Oregon, 548 U. S. __, No. 04-10566 (June 28, 2006) 9

Sawyer v. Smith, 497 U. S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) 6, 10

Schriro v. Summerlin, 542 U. S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) 7, 8, 10, 12, 21

Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) 12

Sullivan v. Louisiana, 508 U. S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) 9

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 1, 2, 5, 6, 8, 9, 11, 12, 13

TRW Inc. v. Andrews, 534 U. S. 19, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) 17

Tyler v. Cain, 533 U. S. 656, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) 9, 12

United States v. Oakland Cannabis Buyers' Cooperative, 532 U. S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) 20

Williams v. Cain, 229 F. 3d 468 (CA5 2000) 17

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 14, 15, 16, 18, 19, 22

Wright v. West, 505 U. S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) 14, 15

United States Statutes

28 U. S. C. § 1738 16

28 U. S. C. § 2244 ..... 19, 21

28 U. S. C. § 2254(d) 1, 13, 16, 19

28 U. S. C. § 2254(e) 19

28 U. S. C. § 2255 19

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 13

State Statute

Nev. Rev. Stat. § 51.385 ..... 2, 3

Treatise

2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure (5th ed. 2005) 12, 15, 17

Miscellaneous

141 Cong. Rec. 15058 16

Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696 (1998) 15

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 2, 14, 16, 17, 20

IN THE

Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,

Petitioner,

vs.

MARVIN HOWARD BOCKTING,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Amicus CJLF has a particular interest in the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) and the deference standard of 28 U. S. C. § 2254(d). In *Teague*, *amicus* submit-

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

ted the brief proposing the rule adopted in that case. See 489 U. S., at 300. Counsel for *amicus* wrote one of the few law review articles defending § 2254(d) as it was written and intended, at a time when it was under severe attack in the law reviews. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). *Amicus* CJLF has filed a brief in most of this Court's major habeas cases from 1988 to the present.

In this case, the Ninth Circuit has once again evaded the limitations placed on federal habeas courts by this Court and by Congress. A state court applied the rules in effect at the time of the appeal faithfully and correctly, yet its decision was overturned in a collateral attack, contrary to the plain wording of the statute. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A medical examination of six-year-old Autumn clearly shows that she was grievously sexually abused. See *Bockting* v. *State*, 109 Nev. 103, 105, 847 P. 2d 1364, 1365 (1993). The question is by whom. At the hospital, she would only tell the detective that someone had hurt her. See *ibid.* Two days later, in an interview at a specially designed interview room at the detective's office, she said it was her stepfather, Marvin Bockting. See *ibid.* This interview was recorded, and the Nevada Supreme Court found that it was conducted "in a manner that was not suggestive, leading or indicative of a predetermined resolve to produce evidence of child abuse." *Id.*, at 110, 847 P. 2d, at 1368-1369.

At trial, Autumn was uncommunicative, and the trial court declared her unavailable as a witness. See *id.*, at 106, 847 P. 2d, at 1366. The court admitted her statement to the detective and her prior statement to her mother pursuant to Nev. Rev. Stat. § 51.385. The statute was enacted in 1985. See *id.*, at 107, 847 P. 2d, at 1367. In drafting this statute, the

Nevada Legislature clearly relied on this Court's decision in *Ohio* v. *Roberts*, 448 U. S. 56 (1980), making "guarantees of trustworthiness" the key criterion for admissibility. Compare *id.*, at 66, with Nev. Rev. Stat. § 51.385(a).

Following the initial affirmance on appeal, this Court vacated and remanded for reconsideration in light of *Idaho* v. *Wright*, 497 U. S. 805 (1990). See *Bockting* v. *Nevada*, 497 U. S. 1021 (1990). In other words, this Court specifically directed the Nevada Supreme Court to apply the *Roberts* " 'particularized guarantees of trustworthiness' " test, as "shown from the totality of the circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, *supra*, at 819. On remand, the state court proceeded to do exactly as directed, and it unanimously found that the *Wright*/*Roberts* standard had been met. See 109 Nev., at 112, 847 P. 2d, at 1369-1370.

Following state postconviction proceedings, Bockting filed a federal habeas corpus petition. The District Court denied the petition, and Bockting appealed. See *Bockting* v. *Bayer*, 399 F. 3d 1010, 1013 (CA9 2005). After oral argument of the appeal, see *id.*, at 1024 (Wallace, J., concurring), this Court decided *Crawford* v. *Washington*, 541 U. S. 36 (2004). Two judges on the three-judge panel agreed that *Crawford* announced a new rule. *Bockting*, *supra*, at 1012; *id.*, at 1025 (Wallace, J., dissenting). One judge concluded that it did not. See *id.*, at 1023 (Noonan, J., dissenting). The majority concluded that the *Crawford* rule qualifies for an exception to the general rule of nonretroactivity. *Id.*, at 1021. The majority opinion further concluded that the exceptions to the nonretroactivity rule are incorporated in 28 U. S. C. § 2254(d). See *ibid.* This Court granted certiorari on May 15, 2006.

SUMMARY OF ARGUMENT

Crawford v. *Washington* is a new rule. By substituting an entirely different standard for the preexisting *Ohio* v. *Roberts* rule, *Crawford* overruled *Roberts*. A rule established by overruling a prior case is obviously not "dictated by precedent" and is *per se* "new" for the purpose of *Teague*.

Crawford does not qualify for the second exception to the rule of *Teague* v. *Lane*. That exception is limited to new rules that establish an "absolute prerequisite to fundamental fairness." *Crawford* is based on history, not fairness. The *Ohio* v. *Roberts* regime it replaced may have been confusing and inconsistent, but it was not fundamentally unfair on the same scale as the practices this Court has previously indicated qualify for that designation: unrepresented indigent defendants in felony cases, confessions extracted by brutality, or lynch mobs surrounding courthouses.

The time has come to recognize what this Court has previously hinted. There are *no* rules of *Gideon* magnitude remaining to be made, and none have been made for decades. The second exception to *Teague* v. *Lane* is history, and litigation over it is a pointless waste of resources. The exception should be formally retired.

The *Teague* exceptions are inapplicable to the deference rule of 28 U. S. C. § 2254(d)(1). Congress enacted a general rule with two stated exceptions, and courts cannot read in additional exceptions that Congress chose not to include. The fact that Congress included retroactivity exceptions in other provisions of AEDPA but not this one indicates the omission was intentional.

The absence of these exceptions does not create any genuine constitutional doubt. Congress has no constitutional obligation to authorize collateral attacks on state judgments at all, and it can limit the attacks it does allow on conditions it sees fit.

The absence of the second *Teague* exception causes no difficulty, because that exception is already obsolete, as noted earlier. The absence of the first *Teague* "exception" could preclude federal habeas relief on a meritorious petition only in an unlikely set of circumstances, which experience in the wake of *Atkins* v. *Virginia* shows has not happened yet. In the unlikely event that such an injustice does occur some time in the future, an alternate remedy can be devised. A statute should not be interpreted in a manner contrary to its plain language to avoid an imagined problem.

ARGUMENT

I. Under the rule of *Teague* v. *Lane*, *Crawford* v. *Washington* does not apply retroactively to cases which were already final before it was decided.

The consensus of the federal circuits is that *Crawford* v. *Washington*, 541 U. S. 36 (2004), does not apply retroactively on habeas corpus under the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). See, *e.g.*, *Lave* v. *Dretke*, 444 F. 3d 333, 336 (CA5 2006) (collecting cases). The consensus is correct.

A. New Rule.

When Justice Harlan first proposed the limitation on habeas now known as the *Teague* rule, he recognized that in some cases the determination of whether a rule was new would be difficult but in others it would be easy. In this context, "the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court." *Desist* v. *United States*, 394 U. S. 244, 264 (1969) (dissenting opinion).

But for the astonishing concurring opinion in the Court of Appeals in the present case, *amicus* CJLF would have thought that the newness of *Crawford* was so obvious as to be beyond dispute and worth no more than a bare citation to *Butler* v.

McKellar, 494 U. S. 407, 412-413 (1990). Regrettably, it appears that some very basic ground must be replowed once again.

Under *Teague*, "a case announces a new rule if the result was not *dictated* by precedent . . . ." 489 U. S., at 301 (emphasis in original). Judge Noonan's concurrence makes no mention of this requirement. He simply quotes *Crawford*'s own statement that its rule is faithful to the Framers' understanding and declares, "*Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue." *Bockting* v. *Bayer*, 399 F. 3d 1010, 1023 (CA9 2005) (Noonan, J., concurring).

Under Judge Noonan's concept of *Teague*, the only new rules are wrong rules. No matter how squarely a decision contradicts earlier precedent, it is not a "new rule" if it is faithful to the original understanding. The precedents of this Court to the contrary are clear and emphatic.

The very next term after *Teague*, the Court clarified in *Butler* that the fact that a court viewed an issue as "controlled" or "governed" by an earlier case did not preclude the later decision from being a new rule. See *Butler*, 494 U. S., at 415. In *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990), the Court held that a rule was new even though earlier cases "lent general support" to its conclusions. State courts could validly have relied on "indications" to the contrary in other decisions. See *id.*, at 237.

In this Court's pre-*Crawford* Confrontation Clause jurisprudence, there were not merely "indications" that the key to admissibility was reliability and not the testimonial versus nontestimonial distinction later adopted in *Crawford*. That was the square holding of *Ohio* v. *Roberts*, 448 U. S. 56 (1980) and other cases in that line, including *Idaho* v. *Wright*, 497 U. S. 805 (1990), the case this Court specifically directed the state court to apply. Not only was the *Crawford* rule not dictated by precedent, a contrary rule was actually dictated by precedent. Prior to *Crawford*, a state court would have *violated* the

doctrine of *stare decisis* if it decided a federal Confrontation Clause claim on the basis of the testimonial nature of the out-of-court statement rather than on the criteria set out in *Roberts*. *Crawford* overruled *Roberts*. See *Davis* v. *Washington*, 547 U. S. __, No. 05-5224 (June 19, 2006) (slip op., at 10, n. 4). If any proposition is clear beyond question in this Court's *Teague* jurisprudence, it is that a case that overrules an earlier precedent creates a new rule. See, *e.g.*, *Butler*, 494 U. S., at 412; *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990); *Graham* v. *Collins*, 506 U. S. 461, 477 (1993).

The notion that a rule is not "new" because it represents a return to the original understanding of the Constitution is refuted by *Schriro* v. *Summerlin*, 542 U. S. 348 (2004). *Ring* v. *Arizona*, 536 U. S. 584 (2002), like *Crawford*, was based on a return to original understanding as the Court now sees it. See *id.*, at 607 (quoting *Apprendi* v. *New Jersey*, 530 U. S. 466, 498 (2000) (Scalia, J., concurring)). Yet the status of *Ring* as a new rule for *Teague* purposes was beyond serious question. See *Summerlin*, *supra*, at 352; see also *id.*, at 358-359 (Breyer, J., dissenting) (not disputing *Ring* was "new" but contending it was "watershed").

So it is with *Crawford*. Under this Court's precedents, it is beyond serious dispute that *Crawford* is a new rule within the meaning of *Teague*.

B. Not An Absolute Prerequisite.

Crawford v. *Washington* was decided on March 8, 2004. Justice Scalia wrote the opinion of the Court. Three months later, Justice Scalia wrote the opinion of the Court in *Summerlin*. The latter opinion says, regarding rules that qualify for the second *Teague* exception, "This class of rules is extremely narrow, and 'it is unlikely that *any* . . . "ha[s] yet to emerge." ' " 542 U. S., at 352 (quoting *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001) (quoting *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990))) (emphasis added) (alteration by the *Tyler* Court). To conclude that *Crawford* fits within the set that

Summerlin says is probably a null set, one would have to conclude that the *Summerlin* Court was oblivious to an opinion issued only three months earlier by the same author. Such a hypothesis would require exceptionally compelling evidence.

The panel majority in the present case concluded that "the *Crawford* rule meets the Court's criteria," *Bockting*, 399 F. 3d, at 1016, by quoting some very general language from *Summerlin* and disregarding the long line of *Teague* cases from this Court. In the context of the whole line, *Crawford* can be seen to be no more "fundamental" than many other rules that have been held not to qualify for the exceptions and it does not come close to the rules that this Court has indicated would have qualified.

Justice Harlan's original proposal was to apply retroactively on habeas "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures . . . ." *Desist*, 394 U. S., at 262. This proposal never became law, and Justice Harlan himself abandoned it just two years later. See *Mackey* v. *United States*, 401 U. S. 667, 694-695 (1971) (opinion concurring in judgments in part and dissenting in part). *Teague* combined the accuracy-enhancing requirement of the *Desist* proposal with a requirement that "the procedure at issue must implicate the fundamental fairness of the trial." 489 U. S., at 312. Further, this exception is limited "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.*, at 313. Still further, the rule must be an "absolute prerequisite to fundamental fairness." *Id.*, at 314.

The generality of this formulation has created widespread confusion. Not only does deciding *Teague* questions take up much of this Court's docket, but the Court itself is often narrowly divided. See, *e.g.*, *Summerlin*, 542 U. S., at 358-359 (Breyer, J., dissenting) (four Justices arguing that *Ring* qualifies).

For 30 years, most of this Court's decisions creating new rules have been thought to enhance the accuracy of convictions. Deliberately subverting the search for truth in criminal trials to serve other goals is a practice in decline, for good reason. See generally *Hudson* v. *Michigan*, 547 U. S. __, No. 04-1360 (June 15, 2006) (refusing to extend the exclusionary rule to new territory); *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, No. 04-10566 (June 28, 2006) (slip op., at 14) (same). Yet this Court has never found any rule created after *Teague* itself to qualify for the exception.[2]

The clarity of the second *Teague* exception comes not from the general and subjective wording of the standard but rather from the examples of what does and what does not qualify. Justice Harlan was thinking primarily of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) when he proposed the exception, see *Mackey*, 401 U. S., at 693-694, and *Gideon* has been the primary example ever since. See, *e.g.*, *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). *Teague* itself also quoted with approval Justice Stevens' list of fundamental rules from *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (dissenting opinion): " 'that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' " *Teague*, 489 U. S., at 313-314.

The four rules cited have four things in common: (1) they are all fundamental; (2) violation of any of them creates a grave risk of convicting an innocent person; (3) all except *Gideon* were, and *Gideon* could have been, decided under the Four-

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2. In the interval between *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), and *Tyler* v. *Cain*, 533 U. S. 656 (2001), a number of Courts of Appeals concluded that because error under *Cage* v. *Louisiana*, 498 U. S. 39 (1990), is "structural," it must qualify for the second exception. See *Tyler*, *supra*, at 672 (Breyer, J., dissenting). The *Tyler* Court rejected the idea that structural errors necessarily qualify. See *id.*, at 666-667. Not only is *Cage* not fundamental, it may not even be correct. See *id.*, at 658, n. 1.

teenth Amendment Due Process Clause without the need for the incorporation doctrine; and (4) they are very old rules. *Gideon* is the relative youngster of the group.

In contrast, the following practices have been found or conceded to not be such fundamental violations of fairness as to qualify for the second exception: interrogation by a police officer regarding a different offense after invocation of *Miranda* rights, see *Butler* v. *McKellar*, 494 U. S., at 416, misleading argument by a prosecutor in the penalty phase, see *Sawyer* v. *Smith*, 497 U. S., at 244, a misleading jury instruction that may have caused the jury to overlook a partial defense reducing murder to manslaughter, see *Gilmore* v. *Taylor*, 508 U. S. 333, 338-339, 345 (1993), failure of the jury in a capital case to find an aggravating circumstance in terms sufficiently defined to meet constitutional requirements, see *Lambrix* v. *Singletary*, 520 U. S. 518, 521, 539-540 (1997), failure to inform the jury that defendant was ineligible for parole when the prosecution argued future dangerousness as the basis for a death sentence, see *O'Dell* v. *Netherland*, 521 U. S. 151, 154, 167 (1997), a jury instruction that may require a death sentence if a single juror does not agree to the existence of a mitigating circumstance, see *Beard* v. *Banks*, 542 U. S. 406, 408, 419-420 (2004), and denial of jury trial on the circumstance that distinguishes capital murder from noncapital murder. See *Summerlin*, 542 U. S., at 358.

When asking whether *Crawford* fits better with the first group of qualifying rules or the second group of nonqualifying rules, it is important to keep in mind that the fundamental nature of a change is not determined in the abstract but rather by comparison to the preexisting state of the law. Thus *Sawyer* v. *Smith*, 497 U. S., at 243-244, held that the special rule against misleading prosecutorial argument at the penalty phase of a capital case was not fundamental in part because preexisting case law protected against remarks that made any trial fundamentally unfair.

The question, then, is whether *Crawford* is such a dramatic leap forward in the fairness of trial relative to the preexisting *Roberts* requirements that it sharply reduces the chance of a wrongful conviction. *Crawford* itself makes no such claim. History, not accuracy of result, permeates the opinion from beginning to end. Rejection of reliability itself as a criterion for decision is the keystone of the opinion. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." 541 U. S., at 67.

Indeed, *Crawford* might result in a net increase in wrongful convictions based on hearsay. *Crawford* hints that even the rankest hearsay presents no Confrontation Clause issue if it is not testimonial. See 541 U. S., at 51. *Davis* v. *Washington*, 547 U. S. __, No. 05-5224 (June 19, 2006) (slip op., at 8-9), elevates that hint to a holding. Under *Roberts*, reliability was the key to admissibility without cross-examination. Under *Crawford*, reliability is irrelevant.

The change made by *Crawford* may very well be faithful to the text and history of the Constitution. It may very well limit the role of judges in accord with the original understanding. See *Crawford*, 541 U. S., at 67. It may very well be a net improvement in the operation of the criminal justice system. Yet the substitution of the *Crawford* rule for the *Roberts* rule is definitely *not* an "absolute prerequisite to fundamental fairness," as is required for the second *Teague* exception. See 489 U. S., at 314. If it were, it would have been recognized long ago.

The *Roberts* Court may have created a framework that produced unpredictable results, see *Crawford*, 541 U. S., at 63, but it did not countenance fundamentally unfair trials. Nothing in *Roberts* remotely compares to forcing a defendant without legal training to defend himself in court. Cf. *Gideon*, 372 U. S., at 344-345. It is not in the same ballpark as beating a confession out of a suspect or conducting a trial while a lynch

mob outside places the jury in fear of their own lives. Cf. *Brown* v. *Mississippi*, 297 U. S. 278, 281-282 (1936); *Moore* v. *Dempsey*, 261 U. S. 86, 89 (1923).

When Justice Harlan first proposed the habeas nonretroactivity rule in 1969, the criminal procedure revolution was in high gear. *Gideon* itself was only six years old. An exception to his proposed rule would have been needed at the time. By the time *Teague* was decided in 1989, this era was long past, and the fundamental problems had all been corrected. The *Teague* Court therefore noted "we believe it unlikely that *many* such components of basic due process [qualifying for the second exception] have yet to emerge." 489 U. S., at 313 (emphasis added). By 2001, the Court saw fit to change "many" to "any," see *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001); accord *Summerlin*, 542 U. S. 352, an implicit recognition that the probability is asymptotically approaching zero.

The time has come, *amicus* CJLF submits, to recognize expressly what *Tyler* and *Summerlin* recognized implicitly. There is *no* practice previously approved by this Court, or uncorrected by this Court despite widespread use in the country, which is so fundamentally unfair that a rule against it would qualify for the second *Teague* exception. One pro-petitioner treatise raises the remote possibility that some jurisdiction might come up with a novel and fundamentally unfair procedure which requires a fundamental new rule simply because it has never been necessary to rule against it before. See 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 25.7, p.1241 (5th ed. 2005). In that event, it is extremely unlikely that resort to habeas corpus would be needed to correct the problem. The days when state courts could be presumed to be inadequate guardians of constitutional rights are behind us and have been for a very long time. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976). In the very unlikely event that a legislature would enact such a law *and* the state courts would approve it, this Court's certiorari docket is

not so crowded that it could not correct a once-in-a-generation error.

The second *Teague* exception is a historical relic. It belongs on the museum shelf. There are no rules "of the primacy and centrality of . . . *Gideon*," *Saffle* v. *Parks*, 494 U. S., at 495, remaining to be made, and none have been made since some time before *Teague*. The extended litigation over whether each new rule qualifies is pointless, fruitless, and a waste of resources. It can and should be ended with a simple declaration that the second exception is history.

II. The prior adjudication rule of AEDPA does not incorporate the *Teague* exceptions.

Properly applied, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), in conjunction with *McCleskey* v. *Zant*, 499 U. S. 467 (1991), would have streamlined and speeded federal review of state criminal cases, especially capital cases. On most questions of federal constitutional law, it is obvious that the state court applied then-existing Supreme Court precedent on direct appeal and that a different rule was neither dictated by precedent nor an absolute prerequisite to fundamental fairness. See *supra*, at 6, 8.

Regrettably, it did not happen, and cases continued to be bogged down for years as multiple courts pondered whether the petitioner was asking for a new rule or an application of an old rule and whether the rule, if new, qualified for the second *Teague* exception. By 1996, Congress had had enough. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), Congress tightened many of the existing limitations. In new subdivision (d) of 28 U. S. C. § 2254, Congress created a new prerequisite for habeas relief. Unlike *Teague*, the new rule versus application question is not dispositive. More importantly for this case, the two exceptions to *Teague* are missing altogether.

New subdivision (d) of § 2254 is commonly called the "deference" rule. During the congressional debate, it was called that by every member who spoke on it, for or against. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945, and n. 400 (1998). Although there was some initial discomfort with that word in court opinions, see *ibid.*, we now see that designation routinely used in opinions. See, *e.g.*, *Rompilla* v. *Beard*, 545 U. S. 374, 387 (2005) (Kennedy, J., dissenting).

The essential backdrop for understanding the deference standard is the debate in *Wright* v. *West*, 505 U. S. 277 (1992). See *Williams* v. *Taylor*, 529 U. S. 362, 410-412 (2000).[3] In *Wright*, the Court asked for briefing on "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case . . . ." 505 U. S., at 284. The Court ultimately decided not to answer this question, see *id.*, at 295, possibly because it could not reach a majority agreement on it.

Justice Kennedy's opinion concurring in the judgment is based on his conclusion that *Teague*'s rule of retroactivity is different in kind from a rule of deference. See *Wright*, 505 U. S., at 306-307. Regarding the comity interest underlying the *Teague* rule, Justice Kennedy wrote,

> "The comity interest is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference. We see that principle at work in the statutory requirement that, except in limited circumstances, the federal habeas court must presume the correctness of state-court factual findings." *Id.*, at 308.

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3. Part II of Justice O'Connor's opinion in *Williams* is the opinion of the Court on the issues discussed in this brief. Part II of Justice Stevens' opinion is effectively a dissent on those points.

Justice O'Connor's opinion, joined by Justices Stevens and Blackmun, endorsed Justice Kennedy's view that retroactivity and deference are qualitatively different rules. See *id.*, at 305.

After enactment of AEDPA, some commentators read the statute to do nothing more than "codify and strengthen *Teague* . . . ." Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696, 868 (1998). In this view, the single most hotly debated section of this very controversial act was actually much ado about not much, doing little more than "express a 'mood' that the Federal Judiciary must respect." *Williams*, 529 U. S., at 386 (opinion of Stevens, J.). The Court rejected this limited view of § 2254(d)(1). See *id.*, at 403 (opinion of the Court). "It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404.

Although some commentators cling to the notion that § 2254(d)(1) is simply a more muscular version of *Teague*'s choice-of-law rule, see, *e.g.*, 2 Hertz & Liebman, *supra*, § 32.3, p. 1580, this Court's case law is now clearly to the contrary. In addition to *Williams*, the unanimous *per curiam* opinion in *Horn* v. *Banks*, 536 U. S. 266, 272 (2002), held that "the AEDPA and *Teague* inquiries are distinct."

The *Teague* rule is basically a "choice of law problem." See *Mackey* v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). The habeas petition is judged by the rules of law in effect on the date of finality, rather than the date of the habeas decision. A choice-of-law rule reaches its logical limit when the court selects the rule of law it will apply to the facts of the case. One of the primary goals of the proponents of AEDPA was to eliminate the overturning of reasonable applications of law to fact by the state courts. See *Williams*, 529 U. S., at 408, n. *. The opponents also understood that changing the standard for "mixed questions" was a primary purpose of the legislation.

See Scheidegger, 98 Colum. L. Rev., at 951-952. Given the views expressed in *Wright* v. *West* that the *Teague* retroactivity rule was not suitable for this purpose, it is not at all surprising that Congress turned to an entirely different type of rule.

Section 2254(d) is stated as a general rule with two exceptions. The general rule is a rule of res judicata. "An application for writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . ." As Senator Biden correctly observed while speaking against this section, "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15058, col. 1-2.

The *Teague* rule of temporal choice of law does not depend at all on whether the state courts have ever ruled on the merits of the claim. See, *e.g.*, *Breard* v. *Greene*, 523 U. S. 371, 373, 377 (1998) (*per curiam*) (*Teague* applied to a claim never raised to state court). For § 2254(d), a state-court ruling on the merits is the threshold requirement. Timing only comes in incidentally through the operation of the first exception. State court decisions are excepted from the general rule of preclusion if they are contrary to clearly established Federal law or apply it unreasonably, and this judgment must necessarily be based on the law that was established "as of the time of the relevant state-court decision." *Williams*, 529 U. S., at 412. This timing aspect is evident from the statute's reference to the state-court decision in the past tense: "*was* contrary . . . ."

As a rule against relitigation of a previously decided question, § 2254(d) belongs to the same family of rules as res judicata, see *Allen* v. *McCurry*, 449 U. S. 90 (1980), the Full Faith and Credit Act, see 28 U. S. C. § 1738, the coordinate court aspect of the doctrine of law of the case, see *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 815, 816 (1988), and the rule that a court hearing a suppression motion should defer to the probable cause determination of the

magistrate who issues a search warrant. See *Illinois* v. *Gates*, 462 U. S. 213, 236-237 (1983); see also Scheidegger, 98 Colum. L. Rev., at 911-917.

The contention that § 2254(d) somehow incorporates the *Teague* exceptions has no basis whatever in the language of the statute. The language states a general rule and two exceptions. If additional exceptions had been intended, they would have been stated. " 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' " *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U. S. 608, 616-617 (1980)). There does not appear to be any statement in the debates or reports on this bill indicating an intent to incorporate the *Teague* exceptions.

Hertz and Liebman cite three cases for the proposition that § 2254(d) might incorporate the *Teague* exceptions. See 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3, p. 1584, and n. 9 (5th ed. 2005). *Muhleisen* v. *Ieyoub*, 168 F. 3d 840 (CA5 1999), predates *Williams* v. *Taylor*. That opinion says, "*If* AEDPA codifies the *Teague* doctrine, . . . that statute could also be read to codify the two exceptions to *Teague* as well." *Id.*, at 844, n. 2 (emphasis added). The premise was rejected by *Williams*, so the conclusion falls as well. The language they cite from *Williams* v. *Cain*, 229 F. 3d 468, 475 (CA5 2000), is dicta. The holding of that case is that AEDPA precludes retroactive application of *Cage* v. *Louisiana*, 498 U. S. 39 (1990). They also cite the Court of Appeals opinion in the present case.

> "Having determined that *Crawford* is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either 'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague*

> exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272, 122 S. Ct. at 2147. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context. Further, it appears that Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions. *See* 28 U.S.C. § 2254(e) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.") But even if Congress' intent is unclear, the constitutional doubt cannon [sic] of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)." *Bockting* v. *Bayer*, 399 F. 3d 1010, 1021 (CA9 2005).

This paragraph is a tangle of confusion. First, the quotation from Justice Stevens' opinion in *Williams* regarding codification of *Teague* is a proposition rejected by the opinion of the Court on this point, which held that § 2254(d)(1) created a new constraint, not a codification of an existing one. See 529 U. S., at 412. Second, the holding of *Horn* v. *Banks* that *Teague* and § 2254(d) are separate is a reason to reject an implicit incorporation of the *Teague* exceptions. A separate and independent

precondition for habeas relief would be pointless if it implicitly incorporated the limitations of the preexisting rule.

Congress did indeed implicitly preserve the *Teague* rule with its exceptions by allowing for retroactivity in multiple places. Congress allowed for retroactivity in the successive petition rule and the statute of limitations, as provided in paragraphs (b)(2)(A) and (d)(1)(C) of § 2244 and the corresponding paragraphs of § 2255. It also provided a retroactivity exception to the rule on default of the factual basis of a claim in § 2254(e)(2)(A)(i). However, it does not follow that the *Teague* exceptions are also exceptions to § 2254(d)(1). Quite the contrary, the fact that Congress provided for retroactivity in five other places, yet made no such provision in § 2254(d), indicates that the latter omission was intentional. See *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997); *Hamdan* v. *Rumsfeld*, 548 U. S. __, No. 05-184 (June 29, 2006) (slip op., at 13).

The lack of a retroactivity exception for § 2254(d)(1) does not nullify the retroactivity exceptions that Congress did make. As *Banks* illustrates and as we discuss *infra*, at 21, regarding retardation, there are occasions where "the relevant state-court decision," *Williams*, 529 U. S. 412, is on state postconviction review. When a state court decides a delayed or successive petition on the merits, applying the retroactive new rule, the petitioner may need §§ 2244(b)(2)(A) and (d)(1)(C) to get into federal court. Once there, however, the § 2254(d)(1) inquiry will be directed to the state-court decision applying the new rule. In addition, if no state court has ever addressed the merits, and no state remedies remain or the state waives exhaustion, the federal court will proceed to the merits without § 2254(d) after clearing the retroactivity hurdles. The canon of construing language to avoid making any part superfluous, see, *e.g.*, *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001), has no place here.

With nothing else to stand on, the Court of Appeals invokes "[t]he 'constitutional doubts' argument . . . the last refuge of many an interpretative lost cause." *Reno* v. *Flores*, 507 U. S.

292, 314, n. 9 (1993). "[H]owever, the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001). Given that § 2254(d) makes no mention of the *Teague* exceptions, is not a rule of retroactivity, and was enacted in a statute that does expressly allow for retroactivity in five other places, a claim that the statute reaches the requisite threshold of ambiguity cannot be sustained.

In addition, the canon in question only applies in cases of "serious constitutional doubts," *Flores*, 507 U. S., at 314, n. 9; *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 135 (2002), and there are none here. The constitutional doubt argument against § 2254(d)(1) was also made in *Williams* v. *Taylor*. See Brief for Petitioner in *Williams* v. *Taylor*, No. 98-8384, p. 44. The Court rejected it by ignoring it. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (argument made by party or dissent is rejected if not mentioned in opinion of the Court).

Congress has no constitutional obligation to provide collateral attacks on state criminal judgments. Congress could forbid federal habeas for state prisoners altogether, and the First Congress did precisely that. This early statute was enforced as written, and its constitutionality was never in doubt. See Scheidegger, 98 Colum. L. Rev., at 932. The greater power to abolish this form of review altogether includes the lesser power to limit it to the circumstances Congress deems desirable, so long as the limitation does not involve any unconstitutional discrimination. See *id.*, at 953-957.

The Court of Appeals was concerned about "depriving individuals of bedrock principles of Due Process." *Bockting*, 399 F. 3d, at 1021. As explained in Part I, *supra*, at 12-13, there simply are no widespread practices in recent history that qualify as violations of "bedrock principles," and direct review is sufficient to deal with any novel violations that might arise in the future. Congress's implicit conclusion that federal

habeas retroactivity is no longer needed in this situation is certainly reasonable.

The first *Teague* "exception" requires more thought, because there are recent examples of new rules that certain conduct can no longer be made criminal, see, *e.g.*, *Lawrence* v. *Texas*, 539 U. S. 558 (2003), or that certain punishments can no longer be imposed on certain defendants. See, *e.g.*, *Atkins* v. *Virginia*, 536 U. S. 304 (2002).

First, we should note that this is not really an "exception" to the *Teague* rule but rather a limitation on the scope of *Teague* to rules of procedure and not substance. See *Summerlin*, 542 U. S., at 352, n. 4. No such limitation can be read into § 2254(d). On its face, the statute protects the integrity of all state-court decisions which were reasonable under the law which was established at the time, whether the issue is substantive or procedural.

Theoretically, then, § 2254(d) could preclude federal habeas relief if (1) the defendant anticipates a forthcoming new rule of substantive law, such as *Lawrence* or *Atkins*, and makes that claim on direct appeal or state postconviction review; (2) the state court rejects the claim on the merits, based on then-existing Supreme Court precedent; (3) this Court later adopts the new, substantive, constitutional rule; (4) the state courts refuse to reopen the case for a new decision on the merits, based on their state successive petition rule or statute of limitations; and (5) the state asserts § 2254(d)(1) and the prior state-court ruling on the merits to preclude reconsideration in federal court.

This scenario could only happen if the state postconviction law lacks exceptions along the lines of 28 U. S. C. § 2244(b)(2)(A) and (d)(1)(C). To see if this is a serious danger, *amicus* checked the case law for *Atkins* cases in the 20 capital punishment states that did not have a statutory prohibition against execution of the retarded prior to *Atkins*. See 536 U. S., at 322 (Rehnquist, C. J., dissenting). The results are

reported in the Appendix to this brief. In a nutshell, *amicus* did not find a single case where § 2254(d)(1) precluded a post-*Atkins* merits review. Generally, the states have provided a mechanism for deciding these claims on the merits. When a new decision on the merits applying the new rule is made on state postconviction review, the § 2254(d) question on federal habeas becomes only whether that new application is reasonable. See, *e.g.*, *Horn* v. *Banks*, 536 U. S. 266, 269 (2002) (District Court denied habeas based on state court's reasonable application of new rule on state postconviction).

An Act of Congress should not be given a tortured construction to avoid mere phantom possibilities. If the courts of any state ever decide that a person must suffer a punishment for which he is not eligible or for an act which is not criminal, there will be an opportunity to decide what remedy may be granted. For example, it remains undetermined whether § 2254(d) is binding in an original habeas application to this Court. See *Felker* v. *Turpin*, 518 U. S. 651, 662-663 (1996). That question may never need to be answered. If the state courts continue to treat new substantive rules as they did *Atkins*, the lack of a retroactivity exception to § 2254(d) will not stand in the way of relief.

Finally, in interpreting § 2254(d), it is important to keep in mind the goals of the legislation. "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams* v. *Taylor*, 529 U. S., at 386 (opinion of Stevens, J.). The opinion of the Court in *Williams* endorses this statement of the congressional purpose, see *id.*, at 404, and goes on to say, "It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Ibid.* The goal of curbing delays is furthered by streamlining and simplifying the issues. It is frustrated by adding exceptions to rules. An exception that is never found but must always be sought is a pointless complexity that causes delay yet achieves no purpose.

Reading the *Teague* exceptions into § 2254(d)(1) would be contrary to both the language and the purpose of the statute. The canon of avoiding constitutional doubt does not apply, because both statutory ambiguity and substantial doubt are absent. The statute should be enforced as written. Decisions subsequent to the relevant state-court decision are not "clearly established Federal law" for the purpose of § 2254(d)(1).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

July, 2006

Respectfully submitted,

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APPENDIX

The following is a summary of how *Atkins* claims have been handled in states without a statute prohibiting execution of the mentally retarded when *Atkins* was decided.

No cases of *Atkins* claims by death row inmates sentenced before *Atkins* were found in Delaware, Idaho, Montana, Nevada, New Hampshire, Utah, or Wyoming.

Alabama

In *Clemons* v. *Alabama*, No. CR-01-1355, 2003 Ala. Crim. App. LEXIS 217 (Aug. 29, 2003), the Court of Criminal Appeals held that rules qualifying for the first *Teague* exception, including *Atkins*, also qualify for the state rule "that an illegal or void sentence may be challenged at any time." *Id.*, at *8, n. 4. The *Atkins* claim was remanded to the trial court for an evidentiary hearing even though raised for the first time on appeal from denial of state postconviction review.

California

In California, it has long been the law that a change in the applicable law is an exception to the successive petition rule. See *In re Clark*, 5 Cal. 4th 750, 767, 855 P. 2d 729, 740 (1993). In *In re Hawthorne*, 35 Cal. 4th 40, 43, 105 P. 3d 552, 554 (2005), the California Supreme Court considered a fourth petition for writ of habeas corpus presenting the same claim that had been rejected three other times. The court considered the petition on the merits and transferred it to the superior court for an evidentiary hearing. See *id.*, at 44, 105 P. 3d, at 554.

Illinois

In *People* v. *Pulliam*, 206 Ill. 2d 218, 794 N. E. 2d 214 (2002), the case was pending on appeal from denial of state postconviction review when *Atkins* was decided. See *id.*, at 257, 794 N. E. 2d, at 236. The court noted that if the defendant raised the issue on a subsequent postconviction petition a hearing would be necessary, so in the interests of judicial economy the

court remanded *sua sponte* for a *de novo* determination of whether defendant was mentally retarded. See *id.*, at 259, 794 N. E. 2d, at 237.

Louisiana

State v. *Williams*, 831 So. 2d 835 (La. 2002) was pending on direct appeal when *Atkins* was decided. The court held that the mandate of *Atkins* is retroactive to any case, at any stage of the proceedings, in which the defendant is facing the prospect of capital punishment. *Id.*, at 851-852, n. 21. The court concluded that defendant was entitled to an evidentiary hearing which would give him an opportunity to prove he is mentally retarded. *Id.*, at 857.

Mississippi

In *Foster* v. *State*, 848 So. 2d 172 (Miss. 2003), the case had been through direct appeal and state postconviction review before *Atkins*. *Id.*, at 172. Federal habeas review ended with denial of certiorari six months after *Atkins*. *Foster* v. *Epps*, 537 U. S. 1054 (2002), rehearing denied, 537 U. S. 1098 (2003). Defendant pursued the issue of mental retardation at the trial level, on initial appeal, and in his postconviction relief petitions. *Id.*, at 176 (Smith, J., dissenting in part). The court applied the statutory "intervening decision" exception to Mississippi's successive petition rule, see Miss. Code Ann. § 99-39-23(7), and authorized the defendant to proceed in the trial court. 848 So. 2d, at 175.

New Jersey

In *State* v. *Harris*, 181 N. J. 391, 526, 859 A. 2d 364, 444 (2004), the New Jersey Supreme Court held that a retardation claim could be considered when raised for the first time in an amendment to a pending state postconviction petition, although the petitioner in that case had not made a sufficient case to warrant an evidentiary hearing.

Ohio

Ohio has a retroactive new rule exception to its statute of limitations and successive petition rules, similar to AEDPA. See Ohio Rev. Code Ann. § 2953.23(A). In *State* v. *Lott*, 97 Ohio St. 3d 303, 306, 779 N. E. 2d 1011, 1015 (2002), the Ohio Supreme Court not only held that this provision applied but went on to stretch the statutory language to excuse *Atkins* claimants from the requirement to show clear and convincing evidence of ineligibility for the death penalty.

Oklahoma

In *Murphy* v. *State*, 54 P. 3d 556, 560 (Okla. Crim. App. 2002), the Oklahoma Court of Criminal Appeals considered an *Atkins* claim that was initially raised in a postconviction petition. The court made an exception to the usual rule against raising claims on postconviction that could have been raised on appeal. See *id.*, 566-567. The court outlined procedures for raising *Atkins* claims in pending cases, with the only prerequisite being that the defendant had previously put his retardation at issue by anticipating *Atkins*, asserting retardation as a mitigating circumstance under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), or asserting ineffective assistance due to counsel's failure to raise the issue. See *Murphy*, *supra*, at 569.

Oregon

In *Pratt* v. *Armenakis*, 199 Ore. App. 448, 452, 112 P. 3d 371, 374 (2005), the Court of Appeals of Oregon considered an appeal from denial of state postconviction relief in a case where *Atkins* was decided while that appeal was pending. The court held that, under controlling statutes, it lacked the authority to remand for a new claim to be considered at that point, but it did not rule out the possibility of considering the claim on the merits in a successive petition under the statutory exception for claims "which could not reasonably have been raised in the original or amended petition." See *id.*, at 454-455, and n. 5, 112 P. 3d, at 374-375, and n. 5; Ore. Rev. Stat. § 138.550(3).

Pennsylvania

In *Commonwealth* v. *Mitchell*, 576 Pa. 258, 273-274, 839 A. 2d 202, 210-211 (2003), the Supreme Court of Pennsylvania decided that *Atkins* claims in pre-*Atkins* cases where the issue had not been raised during trial would be considered on postconviction review. *Commonwealth* v. *Miller*, 888 A. 2d 624, 626 (Pa. 2005), was an *Atkins* claim on a successive postconviction petition by a defendant whose direct appeal and first postconviction review were final before *Atkins*. The case was decided on the merits, with no procedural bars imposed.

South Carolina

South Carolina has a statutory new-rule exception to its successive petition rule, S. C. Code Ann. § 17-27-45(B), and inmates with pre-*Atkins* death sentences can file under this exception. See *Franklin* v. *Maynard*, 356 S. C. 276, 279-280, 588 S. E. 2d 604, 606 (2003).

Texas

The Texas statutory successive petition rule has an exception for cases where "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc., Art. 11.071, § 5(a)(1). When a pre-*Atkins* petitioner files a successive petition making a *prima facie* showing that he is retarded, the Texas Court of Criminal Appeals remands the writ application to the trial court for an evidentiary hearing. See *Ex Parte Briseno*, 135 S. W. 3d 1, 3-4 (Tex. Crim. App. 2004) (application filed on execution date). The Court of Criminal Appeals has denied a number of *Atkins* claims in terse, unpublished orders. As explained in *Ex parte Williams*, No. 43,907-02, pp. 3-4 (Feb. 26, 2003) (Cochran, J., concurring), these denials are on the ground that the particular application does not present a *prima facie* case that the petitioner is actually retarded. Although the Fifth Circuit has not definitively resolved the question, this determination would appear to be a ruling on the merits of the federal question

subject to the deference standard of § 2254(d). See *Moreno* v. *Dretke*, 450 F. 3d 158, n. 3 (CA5 2006).

Virginia

In Virginia, the General Assembly enacted emergency legislation after *Atkins*, Va. Code § 8.01-654.2. That legislation provided a mechanism for raising *Atkins* claims on direct appeal or an initial state habeas petition. The statute also has an unusual provision forbidding successive state petitions under *Atkins* by petitioners whose appeal and initial state habeas were already final when the statute was enacted, but recognizing that these petitioners could pursue a remedy in federal court. The legislature evidently considered the efficiency of proceeding to the merits in federal court, for cases that had already reached that stage, to be more important than the interest of the state in giving its own courts first crack at applying *Atkins*. In this situation, the deference standard does not apply, and the petitioner receives a *de novo* determination of retardation in federal court. See *Walker* v. *True*, 399 F. 3d 315, 319 (CA4 2005).

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IN THE

Supreme Court of the United States

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth Circuits, the Ninth Circuit erred in holding that this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004) regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review.

II. Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates this Court's ruling in *Teague* v. *Lane*, 489 U.S. 288 (1989).

III. Whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth Circuit erred in holding that 28 U.S.C. § 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal proscription and watershed rules.

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Taylor v. *Illinois*, 484 U.S. 400 (1988) 13
Teague v. *Lane*, 489 U.S. 288 (1989) 1, 12, 14, 17
United States v. *Mandanici*, 205 F.3d 519 (2d Cir. 2000) 15
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 16

SCHOLARLY AUTHORITIES

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641 (1996) 14
Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557 (1992) 8
Lyn S. Entzeroth, *Reflections on Fifteen years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. Rev. 161 (2005) 11
4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (2d ed. 2006) 3
Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 Brook. L. Rev. 297 (2005) 8
Robert M. Pitler, *Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 Brook. L. Rev. 1 (2005) 3
1 Thomas Starkie, *Law of Evidence* (1824) 6

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Francis L. Wellman, *The Art of Cross-Examination* (1923) 7

5 J. Wigmore, *Evidence* (3d ed. 1940) 7

Alexander J. Wilson, *Defining Interrogation Under the Confrontation Clause After Crawford v. Washington*, 39 Colum. J.L. & Soc. Probs. 257 (2005) 3

Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203 (1998) 11

OTHER AUTHORITIES

Innocence Lost: the Plea (May 27, 1997), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/ other.html (last visited Sept. 20, 2006) 9, 10

Ninth Circuit Model Criminal Jury Instructions (2003) 16

Stephen J. Cecil & Maggie Bruck, Am. Psychological Ass'n, *Jeopardy in the Courtroom – A Scientific Analysis of Children's Testimony* (1995), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/readings/dolls.html 10

David A. Fahrenthold, *Online Registry or Target List?*, Wash. Post, Apr. 20, 2006 9

Brian MacQuarrie, *Man Defends Attacks on Sex Offenders*, Boston Globe, Dec. 5, 2004 9

Elizabeth Mehren, *Sex Offender Site Back Up; Maine's registry went offline after two men listed were slain and the suspect killed himself*, L.A. Times, Apr. 19, 2006 9

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Katha Pollitt, *Justice for Bernard Baran*, The Nation, Feb. 21, 2000, *available at* http://www.thenation.com/doc/20000221/pollitt 10

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that prior criminal convictions are accurate and based upon reliable, tested evidence. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly held that the new rule announced in *Crawford* v. *Washington*, 541 U.S. 36 (2004), satisfies the test established by this Court in *Teague* v. *Lane*, 489 U.S. 288 (1989), that a new procedural rule applies retroactively to cases on collateral review if such rule is a watershed rule by implicating "the fundamental fairness of the trial." *Teague*,

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

489 U.S. at 412. This is true for two reasons. *First*, to the extent, as the Ninth Circuit held, *Crawford* established a new rule by overruling *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *Crawford* adopted a testimonial approach when determining the admissibility of out-of-court statements at trial. This approach acknowledges that the admission of such testimonial statements, made by a witness who is purported to be unavailable at trial, denies the accused his only constitutional means to assess the veracity of such statements. *Second*, this new rule is a watershed rule of criminal procedure because *Crawford*'s prohibition of the use of testimonial out-of-court statements affects the fundamental fairness and accuracy of a criminal proceeding under the second prong of *Teague* such that it mandates retroactive application to cases on collateral review. The right of an accused to confront his accuser conferred by the Confrontation Clause of the Sixth Amendment is as vital to the protection of an accused's constitutional rights as his Sixth Amendment right to counsel. Deprived of an opportunity to cross-examine a witness, the accused is denied "the 'greatest legal engine ever invented for the discovery of truth.'" *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

ARGUMENT

I. DEPRIVATION OF DEFENSE COUNSEL'S ABILITY TO CONFRONT AN ACCUSER SERIOUSLY DIMINISHES THE ACCURACY OF SUBSEQUENT CONVICTIONS.

The language of *Crawford* itself emphasizes, underlines and reiterates just how vital the right of confrontation is to the fundamental fairness of a criminal trial. It is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." *Crawford*, 541 U.S. at 42 (citing *Pointer* v. *Texas*, 380 U.S. 400 (1965)). In addition, this Court's decision in *Crawford*, which overruled *Roberts*, 448 U.S. 56,

abandons nearly a quarter century of precedent interpreting the Sixth Amendment and adopts a new framework in its Confrontation Clause jurisprudence. *Crawford*, 541 U.S. at 75. See, *e.g.*, Alexander J. Wilson, *Defining Interrogation Under the Confrontation Clause After Crawford v. Washington*, 39 Colum. J.L. & Soc. Probs. 257, 258 (2005); Robert M. Pitler, *Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 Brook. L. Rev. 1, 1-2 (2005).

Crawford's framework preserves the original intention of the drafters of the Confrontation Clause by ensuring that, whenever testimonial evidence is at issue, such evidence will not be admitted at trial unless the accused has had an opportunity to cross-examine the witness. "[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. *Crawford* makes clear that "the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. *Crawford*'s imposition of an outright bar on testimonial statements if the witness is unavailable for trial or otherwise not subject to cross-examination has been interpreted as a new procedural rule by every court that has since addressed the issue. See 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 398.1 (2d ed. 2006) (listing post-*Crawford* cases).

Under *Teague*, a new procedural rule is applied retroactively if it establishes a watershed rule, *i.e.*, a rule "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). This includes a rule "'without which the likelihood of an accurate conviction is seriously diminished.'" *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Teague*, 489 U.S. at 313). *Crawford* satisfies these criteria. The purpose of the Confrontation Clause is to promote accuracy by

ascertaining the truth and reliability of evidence as assessed "in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. *Crawford* does not merely "reshape the contours" of the Sixth Amendment Right to Confrontation, as Petitioner asserts. Brief of Petitioner at 29. Rather, *Crawford* reaffirmed the original intent of the Framers, who properly understood that cross-examination is a fundamental procedure designed to test evidence and thereby enhance its accuracy. *Crawford* thus reiterated what the Framers knew – that a judicial determination of testimonial reliability does not guarantee accuracy. In short, the very purpose of the *Crawford* rule is to enhance the accuracy of the evidence used to convict, and in that regard, one would be hard pressed to identify any factor more relevant to "'the likelihood of an accurate conviction.'" *Summerlin*, 542 U.S. at 352 (quoting *Teague*, 489 U.S. at 313). Accordingly, a failure to test the veracity of the evidence by cross-examination diminishes the likelihood of an accurate conviction.

II. *CRAWFORD*'S NEW RULE GIVES EFFECT TO THE FRAMER'S MECHANISM FOR EVIDENTIARY RELIABILITY – CROSS-EXAMINATION.

The Court has on numerous occasions recognized that confrontation/cross-examination is a necessary predicate for truth and reliability of results in criminal trials. *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *Lee* v. *Illinois*, 476 U.S. 530, 539-40 (1986). *Crawford* established that out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses. This broke completely with the test in *Roberts*, which determined admissibility based on whether

such statements are deemed reliable by a court.[2] *Crawford*, in abrogating *Roberts*'s indicia-of-reliability test for determining when incriminating statements are admissible under an exception to the hearsay rule, completely altered the basis for admitting hearsay and redresses the inherent and permanent unpredictability of *Roberts's* reliability criteria. See *Crawford*, 541 U.S. at 66. In *Crawford*, the Court observed that there is no doubt that the Confrontation Clause "reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), *but about how reliability can best be determined.*" *Id.* at 61 (emphasis added). It highlighted the danger that the application of the *Roberts* reliability standard poses, *id.*, expressing concern about the fact that "[r]eliability is an amorphous, if not entirely subjective, concept." *Id.* at 63. As the Court explained, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* at 61. Permitting a jury to hear evidence that a judge deems reliable without testing it in the adversary process is tantamount to "dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62. The Framers knew that "judges, - like other government officers, could not always be trusted to safeguard the rights of the people; . . . [t]hey were loath to leave too much discretion in judicial hands." *Id.* at 67. By countermanding *Roberts* and other cases like it, the Court acknowledged the Framers' skepticism regarding judicial determinations of reliability and agreed that the Framers' test – confrontation – is the proper mechanism for determining reliability. The rejection of the *Roberts* reliability approach was complete, and it is because of that absolute rejection in *Crawford* that Petitioner's argument that

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[2] Under *Roberts*, there were two ways in which the indicia-of-reliability requirement could be met: (1) where the hearsay statement "falls within a firmly rooted hearsay exception," or (2) where it is supported by a "showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

the *Crawford* rule merely "reshaped the contours" of the right to confrontation must fail. Brief of Petitioner at 29.

A. Cross-Examination Is Critical To The Truth-Seeking Process.

We respectfully disagree with Petitioner's position that cross-examination "may prove to be no more than 'superfluous'" or offer "an 'incidental benefit' at best." Brief of Petitioner at 13 (quoting concurring opinion in *Crawford*, 541 U.S. at 75). This flies in the face of the Framers' view that confrontation is the far better, and fairer, mechanism for determining reliability, and it is wrong. Legal scholars, practitioners and judges have long recognized the importance of cross-examination to discovering the truth.[3] "The power and opportunity to cross-examine . . . is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test." 1 Thomas Starkie, *Law of Evidence* 129 (1824). Of course, if all witnesses had the integrity and smarts to come forward and meticulously follow the letter as well as the spirit of the oath, *to tell the truth, the whole truth and nothing but the truth*, and, if attorneys on both sides had the necessary experience, combined with the integrity and intelligence and swore to develop the whole truth and nothing but the truth, there would of course be no need for cross-examination. But, as yet, "no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing

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[3] In the past eight years, there have been no less than thirty-five articles in The Champion, published by the NACDL, addressing the importance of cross-examination for both the defense and the prosecution. Cross-examination is so important to testing the reliability of witnesses that NACDL dedicates countless hours to providing criminal defense attorneys with preparation in cross-examinations. This year alone NACDL will offer more than twelve different seminars and workshops on cross-examination techniques to criminal defense attorneys. Other associations such as the American Bar Association also provide many workshops and seminars on cross-examination to attorneys.

exaggerated statements to their true dimensions." Francis L. Wellman, *The Art of Cross-Examination* 7 (1923).

Cross-examination helps the truth-seeking process in at least three vital ways. First, cross-examination allows the opposing counsel to introduce additional necessary facts which the witness may have omitted during direct examination. Typically, those suppressed or underdeveloped facts, as described by Professor Wigmore[4] in his seminal treatise on evidence, are (1) "the remaining and qualifying circumstances of the subject of testimony" and (2) "the facts which diminish the personal trustworthiness or credit of the witness." 5 J. Wigmore, *Evidence* § 1368, at 37 (3d ed. 1940) (emphasis omitted). If nothing more were done to reveal all the facts known to the witness, the witness's testimony "might present half-truths only." *Id.* "Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent." *Id.* While some facts can be introduced by other witnesses, often these important additional facts can "be obtained only from the witness himself – particularly those which concern his personal conduct and his sources of knowledge for the case in hand." *Id.*

The second vital way cross-examination helps the truth seeking process is by allowing these important facts to be introduced immediately after direct examination, in order to refute what the jury may have just heard. In this way, "the modification or the discredit produced by the facts extracted is more readily perceived by the [fact-finder]." *Id.* at 38. Finally, cross-examination allows the essential refutation to come directly from the witness him- or herself; a damaging effect that can hardly be matched by hearing contradictory testimony provided by other witnesses. *Id.*

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[4] Professor Wigmore devotes over 200 pages in his treatise to cross-examination and confrontation, underscoring the importance of cross-examination to the truth-seeking process.

B. *Crawford* Curbs Prosecutorial Abuse Of Testimonial Statements.

Crawford also preserves the Framers' understanding that confrontation curbs the abuse of state power. *Crawford*, 541 U.S. at 56 n.7. The "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Id.* The prosecution's power provides an enormous advantage to the prosecution in a criminal trial, which the Bill of Rights is designed to limit. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 561 & n.18 (1992) (citing *Wardius* v. *Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring)). The Framers designed the Confrontation Clause to curb such abuse in at least three ways: by preventing: (1) secrecy about the identity of the witness providing testimony or the circumstances surrounding the testimony; (2) presentation of a false account of the witness' story or the conditions under which it was produced; and (3) pressuring the witness with intimidation or taking advantage of his vulnerabilities. Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 Brook. L. Rev. 297, 298 (2005).

Nowhere are the twin concerns of reliability and state conduct more visible than in cases involving child abuse. When the prosecution obtains evidence through private interviews, the potential for abuse is increased because the prosecution has the power and incentive to mold the child's responses to conform to the theory of the case. In this case, in a recorded interview, the child made statements to a police detective and also demonstrated the incidents with anatomically correct dolls. At the preliminary hearing, the prosecutor questioned the child. During the course of this questioning, the child could not remember what she had told the police detective. In spite of this uncertainty (and

suggestion that the original questions may have been leading, given the child's inability to recall events of this magnitude), the judge declared that the child was an unavailable witness, determined the child's statements were reliable and admitted them into evidence. Without having seen the child or heard her answers to these absolutely core questions, the jury found Mr. Bockting guilty and he now serves a life sentence. His counsel never had the opportunity to examine the child to test for suggestibility, *i.e.*, whether the child may have been led into false testimony. Instead, he was convicted on the basis of a judge's determination that the child's earlier statements were more reliable than the later ones, a critical determination that only the jury could perform.

The inability to conduct any sort of examination of principal witnesses in child abuse prosecutions has had a telling effect on the reliability and accuracy of convictions in such cases. Accusations of sexual abuse of children understandably raise the most powerful emotions, and often also incite terrible acts of supposed vengeance. David A. Fahrenthold, *Online Registry or Target List?*, Wash. Post, Apr. 20, 2006, at A03; Brian MacQuarrie, *Man Defends Attacks on Sex Offenders*, Boston Globe, Dec. 5, 2004, at A1; Elizabeth Mehren, *Sex Offender Site Back Up; Maine's registry went offline after two men listed were slain and the suspect killed himself*, L.A. Times, Apr. 19, 2006, at A7. As a result, there are numerous, well-documented miscarriages of justice where, as here, the defense never had the opportunity to examine and to test the principal testimonial evidence underlying a conviction. See Innocence Lost: the Plea (May 27, 1997) (PBS television broadcast), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/other.html (last visited Sept. 20, 2006). Instead, as these cases amply demonstrate, the defense must contend with a biased or interested prosecution witness whose function is to offer the hearsay statements of the victim and to defend the truth and reliability of those statements, often on the basis of

their own credibility rather than that of the child. *Id.;* see also *State* v. *Michaels*, 625 A.2d 489, 510 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994); *Snowden* v. *Singletary*, 135 F.3d 732, 737-38 (11th Cir. 1998).

The subsidiary issues at work in such cases are also present here. For example, experts have long questioned and discredited the tactic of asking leading and repetitious questions in connection with the use of anatomical dolls. Stephen J. Cecil & Maggie Bruck, Am. Psychological Ass'n, *Jeopardy in the Courtroom – A Scientific Analysis of Children's Testimony* (1995), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/readings/dolls.html. To that end, this Court has held that leading questioning may provide grounds for overturning a conviction. *Idaho* v. *Wright*, 497 U.S. 805, 826-27 (1990) ("'[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness'" (alteration in original) (quoting *State* v. *Robinson*, 735 P.2d 801, 811 (Ariz. 1987)). Sensational, but ultimately inaccurate medical evidence has also been a common feature of such prosecutions. *Swan* v. *Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993). See also Katha Pollitt, *Justice for Bernard Baran*, The Nation, Feb. 21, 2000, *available at* http://www.thenation.com/doc/20000221/pollitt; *Commonwealth* v. *Baran*, No. 18042-51, 2006 WL 2560317 (Mass. Super. Ct. June 16, 2006). And finally, such cases are marked by judges reaching highly subjective declarations of the incompetence and unavailability of the alleged victim because the victim cannot remember the alleged events, see, *e.g.*, *State* v. *Blue*, 717 N.W.2d 558 (N.D. 2006), provided inconsistent descriptions of the alleged events, see, *e.g.*, *George* v. *State*, 813 S.W.2d 792 (Ark. 1991), or proves unable to distinguish between the truth and a lie, see, *e.g.*, *State* v. *Dwyer*, 440 N.W.2d 344, 345-46 (Wis. 1989), and then admitting an alleged victims' hearsay declarations

without providing defendants an opportunity to cross-examine.

While there obviously needs to be sensitivity in such cases, such sensitivity does not warrant wholesale suspension of Confrontation Clause rights. The long history of miscarriages of justice in this area demonstrate just how fundamental the Confrontation Clause right is in producing a reliable and accurate result at trial.

III. CONFRONTATION, LIKE COUNSEL AND COMPULSORY PROCESS, IS A BEDROCK RULE OF CRIMINAL PROCEDURE.

Before determining whether *Crawford* can be applied retroactively under *Teague*, the initial threshold question is to determine whether it is a new rule. While the Ninth Circuit divided on this question, the majority found that *Crawford* is a landmark decision that establishes new criteria for determining the admission of witness testimony – the testimonial approach.[5] In this respect, the majority found, *Crawford*'s break with precedent qualifies it as a new rule under the new rule doctrine of *Teague* and its progeny. See Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203 (1998); Lyn S. Entzeroth, *Reflections on Fifteen years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M L. Rev. 161 (2005).

The next step under *Teague* is to determine whether this rule can be applied retroactively to cases on collateral review.

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[5] *Amicus* takes no position as to whether *Crawford* is an old or new rule. *Bockting* v. *Bayer*, 399 F.3d 1010, 1024 (9th Cir.) (Noonan, J. concurring), *opinion amended on denial of reh'g*, 408 F.3d 1127 (9th Cir. 2005), *cert. granted sub nom. Whorton* v. *Bockting*, 126 S.Ct. 2017 (2006).

Since 1965, the Court has been curbing the impact of retroactive applications of law. See *Teague*, 489 U.S. at 302 (discussing retroactivity jurisprudence from *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *disapproved*, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) to the present). While there is a general presumption against retroactive application of procedural rules, it is not irrebutable; granting retroactive relief to state prisoners based on newly articulated rules is neither an arbitrary nor modern creation that may be swept aside or haphazardly curtailed. See *Teague*, 489 U.S. at 316. New procedural rules generally do not apply retroactively because they do not produce a class of persons convicted of conduct the law does not make criminal, "but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352. Nonetheless, new procedural rules that are fundamental and "'without which the likelihood of an accurate conviction is seriously diminished" are applied retroactively on a collateral review. *Id.* (emphasis omitted) (quoting *Teague*, 489 U.S. at 313). Under the second exception of *Teague*, a procedural rule can be applied retroactively only if it is a watershed rule, a rule which goes to the "fundamental fairness" and accuracy of the criminal proceeding, or a rule that is one "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 312-13.

Crawford falls under the second exception because it establishes a new watershed procedural rule in preserving the Sixth Amendment rights of the accused. In *Crawford*, the Court undertook a thorough examination of the history of the Confrontation Clause to understand its original meaning and concluded that the Founding Fathers meant to prohibit testimonial statements such as "'*ex parte* in-court testimony or its functional equivalent'" that the "'defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'"

Crawford, 541 U.S. at 51 (quoting *White* v. *Illinois*, 502 U.S. 346, 265 (1992)). Specifically, the Court emphasized "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Further, this Court reasoned that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Id.* at 68.

The Court has recognized the importance of cross-examination to the reliability of a result in a criminal trial numerous times. Cross-examination enables the accused to explore inconsistencies between a witness' testimony and other evidence, probe any biases that may have led the witness to distort the truth, and open lines of inquiry that the State, for whatever reason, may have neglected. *Taylor* v. *Illinois*, 484 U.S. 400, 411-12 (1988) (stating "cross-examination[] minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony"). There has been a long history of this procedural protection. As the Court notes in *Crawford* (citing *King* v. *Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696)), the Court of the King's Bench held that "the admissibility of an unavailable witnessess's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him." *Crawford*, 541 U.S. at 45. Further, in *Pointer*, 380 U.S. at 405, this Court noted: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-

determining process.'" *Chambers*, 410 U.S. at 295. As one noted scholar states,

> The deep principles underlying the Sixth Amendment's three clusters and many clauses . . . are the protection of innocence and the pursuit of truth. . . .
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> . . . .
>
> . . . Counsel, confrontation, and compulsory process are designed as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 642-43 (1996).

IV. AS WITH THE COURT'S HOLDING IN *GIDEON*, RETROACTIVE APPLICATION IS APPROPRIATE HERE.

New procedural rules should be applied retroactively when they are watershed or bedrock procedural rules, *i.e.*, rules without which the likelihood of an accurate conviction would be seriously diminished. See *Summerlin*, 542 U.S. at 352 and *Teague*, 489 U.S. at 313. *Crawford* announces such a rule. Cross-examination is essential to the fundamental right of confrontation and has been recognized by this Court as "the principal means by which the believability of a witness and the truth of his testimony are tested." See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). The *Crawford* rule goes to the heart of the fundamental fairness and accuracy of a criminal proceeding. Not only is it fundamentally *un*fair to permit testimony to be admitted when the witness is unavailable and a defendant is not given the opportunity to cross-examine the witness, it is fundamentally unfair to conduct a trial in which only one side has unfettered access to the principal witnesses and key testimony. See *Saffle*, 494 U.S. at 495. Here, the child's statements that were admitted without cross-examination were the critical and primary statements used by

the prosecution to present its case against defendant and the primary statements that led to Mr. Bockting's conviction. The admission of these wholly untested statements diminished the likelihood of an accurate conviction, even putting to one side the child's inconsistency as to whether the abuse occurred. The principal witness in this matter was in the hands of government agents and prosecutors at all times and, plainly, was subjected to leading, misleading and repetitive questioning. The Framers themselves expressed skepticism about the abilities of a jury to discern the truth under such conditions. For this reason, they enshrined cross-examination as the means of bringing out the truth in a trial, exposing falsehoods, and ensuring that evidence admitted against an accused is reliable. See *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895). In this respect, *Crawford* establishes a watershed rule of criminal procedure that is at least equal to the right to counsel as set forth in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for the two go hand-in-hand. Little is to be gained from the provision of counsel if counsel is deprived of its most essential tool.

Further, the *Teague* test, while restrictive, cannot rationally apply to but one instance among bedrock principles of criminal procedure. *Gideon* cannot be the only watershed rule. *Gideon* addressed only one right conferred by the Sixth Amendment, the right to counsel. It makes little sense to establish a test such as *Teague* unless the Court expected that other rules, prospectively made, would satisfy the second exception of *Teague* and qualify for retroactive effect. Nevertheless, courts continue to view the right to counsel as the only right conferred by the Sixth Amendment as a watershed rule that can pass through *Teague*'s funnel. See, *e.g.*, *O'Dell* v. *Netherland*, 521 U.S. 151, 167 (1997); *Saffle*, 494 U.S. at 495; *Leavitt* v. *Arave*, 383 F.3d 809, 826 (9th Cir. 2004) (per curiam); *United States* v. *Mandanici*, 205 F.3d 519, 528-29 (2d Cir. 2000).

From the perspective of a criminal defendant, cross-examination means not only the ability to get at the truth, but the ability to present one's own version of the *facts*. Questions and arguments from counsel are not testimony and jurors may not consider them as evidence. See Ninth Circuit Model Criminal Jury Instructions § 3.7 (2003). Accordingly, a prosecution's admissions on cross-examination are a principal means – and often, the only means – to establish a defense that the jury may consider. Many, many prosecutions, as here, involve accusations made by one or more witnesses where the only possible defense witness is the defendant himself. For independent and sensible reasons, a defendant may elect not to testify and where that is the case, cross-examination is the sole procedural vehicle for the defense to present its case. Deprivation of that vehicle, whether it is the sole vehicle or not, is tantamount to disallowing a defense altogether. As such, it cannot help but seriously diminish the likelihood of an accurate conviction. Thus, the rule in *Crawford* should be deemed a watershed rule by this Court for purposes of *Teague* and applied retroactively for cases on collateral review just as was done with the rule in *Gideon*.

The *Teague* exceptions are sufficiently narrow to discourage overuse. It is fundamentally fair to permit habeas petitioners to benefit from new rules that enforce bedrock constitutional protections. Retroactive application is a power this Court retains for exceptional cases to ensure that there is a floor of fundamental fairness in our criminal justice system. See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (all criminal defendants facing the possibility of imprisonment have the right to counsel); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (criminal statutes may not be arbitrarily applied to persecute one group).

Furthermore, the retroactive application of the *Crawford* rule serves the fundamental purpose of the Great Writ of Habeas Corpus to protect the innocent criminal defendant

from erroneous conviction and punishment. See *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). Indeed, federal habeas corpus petitions are meant to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist* v. *United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), quoted in *Teague*, 489 U.S. at 312; see *O'Neal* v. *McAninch*, 513 U.S. 432, 442 (1995) ("the basic purposes underlying the writ of habeas corpus" include correcting "an error of constitutional dimension – the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person"). *Crawford* itself was based on the principle that cross-examination is essential to obtaining an accurate conviction. The retroactive application of *Crawford*, therefore, is not only consistent with the fundamental purpose of the Great Writ, but it also reinforces the basic protection that the Writ was designed to provide.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondent's Brief, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF TEXAS, CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review.

2. Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates *Teague v. Lane*, 489 U.S. 288 (1989).

3. Whether the Ninth Circuit erred in holding that 28 U.S.C. §2254(d)(1) and (2) adopted the *Teague* exceptions for watershed rules and for private conduct that is beyond criminal proscription.

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INTEREST OF *AMICI CURIAE*

The *amici* States, through their Attorneys General, respectfully submit this brief in support of Petitioner. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Court held that the Sixth Amendment's Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." This case presents the question whether the *Crawford* rule should be applied retroactively in federal habeas review. The States have a substantial stake in this question because the finality of innumerable state criminal judgments turns on the outcome.

The Court has long recognized the States' interest in the finality of criminal convictions. *See Beard v. Banks*, 542 U.S. 406, 413 (2004). The presumption that new rules of criminal procedure do not apply retroactively furthers this interest by limiting the power of federal courts to issue habeas relief. *See id.*, at 412-13. Otherwise, "the application of new rules to cases on collateral review . . . [would] continually force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989).

The present controversy fully implicates these concerns for finality and the preservation of state resources. A decision that *Crawford* applies retroactively would have an immediate and far-reaching effect on the States' criminal justice systems. Such a holding would potentially expose to collateral attack any conviction involving a Confrontation Clause issue that was resolved under prior law. The number of cases in this category is undoubtedly immense. Relitigating these long-final criminal convictions through federal habeas proceedings would stretch the States' already limited resources and force a serious realignment of prosecutorial priorities. For these reasons, 38 states urge the Court to reverse the judgment of the Ninth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

***Crawford* Established a New Rule of Federal Law.** *Crawford* imposed a new analytical question in Confrontation Clause jurisprudence. A court must now determine whether evidence is "testimonial" in order to determine whether it can be introduced in a criminal prosecution without live testimony. As a result, all of the courts to address this issue – including two of the judges on the panel opinion in this case – have determined that *Crawford* is a new rule under *Teague* that presumptively does not apply retroactively to final convictions under federal habeas review.

Under *Teague*, *Crawford* does not apply retroactively because it is not a "watershed rule": *Crawford* changed the analysis by which a court determines whether evidence can be introduced at trial. But that change does not constitute a "watershed rule" excepted from *Teague*'s nonretroactivity principle. A watershed rule is one that creates an entirely new principle of criminal due process, on the level of magnitude of the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 355 (1963). *Crawford*'s incremental change in the test for determining whether evidence can be introduced without the testimony of a live witness does not meet that high standard.

Retroactive application of *Crawford* would frustrate the States' interest in administering the criminal justice system in a fair and efficient manner. The *Crawford* test has created a significant amount of appellate litigation attempting to delineate the scope of the testimonial-evidence requirement. The potential number of collateral habeas claims is, accordingly, enormous. Relitigation of these convictions would place a major strain on the resources of the state and federal courts. That strain would be completely out of a proportion to the change effected by *Crawford*. And it provides a compelling reason why the Court should hold that *Crawford* does not apply retroactively in federal habeas cases.

Under §2254(d)(1) of the AEDPA, the new rule announced in *Crawford* cannot apply retroactively. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court cannot grant a writ of habeas corpus unless the state court's merits decision was contrary to or an unreasonable application of clearly established Supreme Court precedent as of the time the state court denied relief. 28 U.S.C. §2254(d)(1). And, contrary to what the court of appeals held, Section 2254(d)(1) does not incorporate the *Teague* exceptions. A plain reading of the statute establishes the absence of these exceptions: the "clearly established" requirement in that section is unqualified. And a comparison of the text of §2254(d)(1) with the language of other AEDPA provisions provides strong evidence that Congress did not intend to incorporate the *Teague* exceptions into §2254(d)(1).

Here, Bockting relies on *Crawford* as the basis for his Sixth Amendment claim. But *Crawford* was not clearly established precedent in 1993 when the Nevada Supreme Court denied relief. And because the *Teague* exceptions are not incorporated into §2254(d)(1), Bockting cannot circumvent the statute's "clearly established" requirement by seeking to prove that *Crawford* constitutes a watershed rule of criminal procedure.

ARGUMENT

I. UNDER *TEAGUE*, *CRAWFORD* ANNOUNCED A NEW RULE THAT DOES NOT APPLY RETROACTIVELY.

The *Teague* principle of nonretroactivity "prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Application of this principle involves three steps. First, "the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Id.*, at 390. Next, "the court must survey the legal landscape as it then existed, and determine whether a state

court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *Id.* (citations and quotations omitted). Stated differently, the Court must assess whether the defendant "seeks the benefit of a new rule." *See id.* "Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Id.*

It is undisputed that Bockting's conviction and sentence were final at the time *Crawford* was decided. Thus, this case involves only the second and third inquiries in the *Teague* analysis: whether *Crawford* announced a new rule and, if so, whether *Crawford* nevertheless falls within one of *Teague*'s exceptions that would permit a federal court to apply *Crawford* retroactively to Bockting's habeas proceeding. The answer to these questions is plain: by its terms, *Crawford* announced a new rule, and it does not come within either of *Teague*'s exceptions.

A. *Crawford*'s Change in Sixth Amendment Analysis Created a "New Rule."

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S., at 301 (citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)). Put another way, a rule is new when its result was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting)); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990).

For a quarter-century prior to *Crawford*, federal courts determined the admissibility of hearsay evidence in a criminal

proceeding under the "reliability" standard announced in *Ohio v. Roberts*, 444 U.S. 56 (1980):

> "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*, at 66 (footnote omitted).

In *Crawford*, the Court abandoned the *Roberts* standard for hearsay evidence classified as "testimonial." For such evidence, the Court held that the Sixth Amendment requires a showing of both unavailability *and* a prior opportunity for cross-examination before the evidence will be admitted. *Crawford*, 541 U.S., at 68. *Crawford* did not fully define what evidence qualifies as "testimonial," explaining that "[w]hatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*[1] But the Court left no doubt that its decision was a departure

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1. Subsequently, in two consolidated cases on direct review, the Court adopted a case-specific standard for determining whether a particular statement, in a particular situation, should be considered "testimonial" for *Crawford* purposes. *Davis v. Washington*, 126 S.Ct. 2266 (2006). The Court's narrowly drawn opinion held that statements made in a police investigation are non-testimonial when the purpose of seeking police assistance is to deal with an ongoing emergency, but are testimonial when there is no such emergency and the interrogation is intended to establish or prove past events. *Id.*, at 2273-74. *Davis* did not elucidate a broader principle for recognizing testimonial statements.

from prior law: *Crawford* expressly overruled *Roberts* to the extent it applied to "testimonial" evidence. 541 U.S., at 60-61; *see also id.*, at 69, Rehnquist, C.J., concurring) ("I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent.").

It is difficult to conceive a truer hallmark of a new rule than the express overruling of precedent. Indeed, when a rule is born from these circumstances, it by definition qualifies as a "new rule" for *Teague* purposes. *See Saffle*, 494 U.S. at 488.[2] For this reason alone, *Crawford* satisfies the second step in the *Teague* analysis.

Moreover, *Crawford* represents a clear break from *Roberts* because, for testimonial evidence, it redirects the focus of the Confrontation Clause analysis from indicia of reliability to "the principal evil at which the Confrontation Clause was directed[:] the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S., at 50. This analytical distinction further cements *Crawford*'s status as a new rule.

Finally, the near unanimity of lower courts on this issue corroborates the States' position. Every federal circuit to reach the question has concluded that *Crawford* announced a new rule under *Teague*,[3] and even those that have not addressed it have consistently

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2. Indeed, the concurring justices explicitly characterized the rule as "new." *Crawford*, 541 U.S., at 75 (Rehnquist, C.J., and O'Connor, J., concurring in the judgment).

3. The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held that *Crawford* announces a new rule and that it does not apply retroactively. *Lave v. Dretke*, 444 F.3d 333, 335 (CA5 2006), *petition for cert. filed*, June 13, 2006 (No. 05-11552); *Dorchy v. Jones*, 398 F.3d 783, 788 (CA6 2005); *Bintz v. Bertrand*, 403 F.3d 859, 866 (CA7), *cert. denied*, 126 S.

declined to apply *Crawford* retroactively.[4] State courts considering the question have reached the same result.[5] In stark contrast to this broad consensus, Judge Noonan's concurrence in this case appears to be the only judicial opinion to treat *Crawford* as though it did not create a new rule. *Bockting v. Bayer*, 399 F.3d 1010, 1023 (9th Cir. 2005) ("*Bockting I*") (Noonan, J., concurring), *as amended*, 408 F.3d 127, *and rehearing denied*, 418 F.3d 1055.

Ct. 174 (2005); *Murillo v. Frank*, 402 F.3d 786, 790 (CA7 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1226 (CA10 2004), *cert. denied sub nom. Brown v. Lampert*, 543 U.S. 1079 (2005); *Espy v. Massac*, 443 F.3d 1362, 1366-67 (CA11 2006).

4. The Second Circuit assumed without deciding that *Crawford* announced a new rule. *See Mungo v. Duncan*, 393 F.3d 327, 335 (CA2 2004), *cert. denied sub nom. Mungo v. Greene*, 544 U.S. 1002 (2005). The Eighth and First Circuits likewise assumed that *Crawford* did not merit retroactive application. *Evans v. Luebbers*, 371 F.3d 438, 444-45 (CA8 2004) (noting that the rule did not appear to fit within either of *Teague*'s exceptions), *cert. denied sub nom. Evans v. Roper*, 543 U.S. 1067 (2005); *McGonagle v. United States*, 137 Fed. Appx. 373, 380 (CA1 2005) (unpublished opinion) ("It is doubtful that *Crawford* applies retroactively to cases on collateral review.").

5. *See, e.g., In re Markel*, 111 P.3d 249, 270 (Wash. 2005) (*en banc*) ("[W]hile the reasoning in *Crawford* relied upon the historical underpinnings of the [C]onfrontation [C]lause, the rule itself is a departure from previous United States Supreme Court precedent."); *Edwards v. People*, 129 P.3d 977, 984-86 (Colo. 2006) (*en banc*) (same); *see also Drach v. Bruce*, No. 93,654, 2006 WL 1562105 (Kan. June 9, 2006); *Chandler v. Crosby*, 916 So.2d. 728, 729-31 (Fla. 2005).

B. The *Teague* Exception for "Watershed Rules" Does Not Apply to *Crawford*.

The two "narrow" exceptions to the *Teague* non-retroactivity principle are (1) rules forbidding punishment "of certain primary conduct . . . prohibiting a certain category of punishment for a class of defendants because of their status or offense," or (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). This case does not implicate the first exception because *Crawford* regulates "only the manner of determining the defendant's culpability." *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Crawford also does not satisfy the second exception because it is not a "watershed rule." Such rules "require[] the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S., at 311. For this exception to apply, "the procedure at issue must implicate the fundamental fairness of the trial" or its absence must "seriously diminish the likelihood of obtaining an accurate conviction." *Id.*, at 312, 315. That is, a "watershed rule" must do more than "preserve the accuracy" of criminal convictions; it must also recognize the emergence of "a component of basic due process." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citing *Solem v. Stumes*, 465 U.S. 638, 654 (1984)). It is thus insufficient that the "new procedural rule is 'fundamental' in some abstract sense[.]" *Summerlin*, 542 U.S., at 352 (citation omitted). Measured against this high standard *Crawford* is not a watershed rule.

1. *Crawford* does not implicate a trial's fundamental fairness.

To assess whether a new rule implicates a trial's "fundamental fairness," the Court may compare it to the paradigmatic watershed rule, *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494

U.S. at 495 (the rule in *Gideon* is "usually cited . . . to illustrate the type of rule coming within the exception."). In *Gideon*, the Court announced, for the first time, that the Sixth Amendment's guarantee of counsel "in all criminal prosecutions" was a fundamental and essential part of due process and that the States were bound by this command through the Fourteenth Amendment. 372 U.S., at 342-45. This bright-line, fundamental rule – that all defendants were entitled to counsel – definitively altered the courts' understanding of what constitutes basic due process.

In sharp contrast to *Gideon*, *Crawford* "did not confer a substantive constitutional right that had not existed before." *Solem*, 465 U.S. 648, at 644 n.4 (1984) (internal quotation marks and citations omitted). Rather, it simply changed the standard for determining whether evidence is sufficiently reliable that it can be introduced at trial without live testimony while satisfying the Confrontation Clause. Stated differently, *Crawford* "created a protective umbrella serving to enhance a constitutional guarantee." *Id.* To be sure, the right established by the Confrontation Clause is a "bedrock procedural guarantee." *Crawford*, 541 U.S., at 42. But not every rule effectuating such rights necessarily acquires that fundamental character.[6] *See Johnson v. McKune*, 288 F.3d 1187,

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6. The Court has twice before given retroactive effect to rules effectuating the guarantee of the right of confrontation. Both are easily distinguishable. First, in *Roberts v. Russell*, 392 U.S. 293 (1968) (per curiam), the Court's decision to apply its holding retroactively derived from its earlier analysis in *Linkletter v. Walker*, 318 U.S. 618 (1965). *Teague* expressly rejected *Linkletter*. 489 U.S., at 302 ("The *Linkletter* retroactivity standard has not led to consistent results."), 303 ("Application of the *Linkletter* standard has led to disparate treatment of similarly situated defendants on direct review."). Thus, *Roberts*' precedential value after *Teague* is in doubt. Second, *Berger v. California* came to the Court on direct appeal. 393 U.S. 314 (1969) (per curiam), and there is no such bar on the retroactive application of new

1199 (CA10 2002) ("Not every holding that draws on a wellspring rule is itself a wellspring holding.").

Moreover, unlike *Gideon*, *Crawford* did not announce a categorical rule, but refined a case-specific standard – as the Court's recent decision in *Davis* illustrates. Determining whether evidence is "testimonial," and thus subject to *Crawford*'s heightened admissibility requirements, will typically require a case-by-case inquiry turning on the factual circumstances in which the evidence was developed. *See Davis*, 126 S. Ct., at 2270, 2273-74; *see also id.*, at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that this test is as unpredictable as the *Roberts* test that was criticized in *Crawford*). Such a fact-intensive rule defies characterization as "fundamental."

2. The *Crawford* rule's absence did not seriously diminish the likelihood of obtaining accurate convictions.

Similarly, the absence of the *Crawford* rule in earlier cases did not "seriously diminish the likelihood of obtaining an accurate conviction." *Teague*, 489 U.S., at 312. Although in *Crawford* the Court criticized the displaced *Roberts* test as "unpredictable," *id.*, at 68 n.10, that assessment does not necessarily undermine the accuracy of convictions involving testimonial evidence admitted under that test. Under *Roberts*, only statements adjudged reliable were admissible. That *Crawford* may have raised the bar for admissibility does not demonstrate that the *Roberts* test created an impermissible risk of false conviction. *See Lave*, 444 F.3d, at 336. As Judge Easterbrook explained in *Murillo*:

> "[I]t would be a close question whether *Crawford* helps or hinders accurate decisionmaking. Live testimony is

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rules for cases on direct appeal.

> preferable to affidavits and transcribed confessions, but recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one's confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the [S]ixth [A]mendment gives the accused the right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the [S]elf-incrimination [C]lause and other provisions in the Bill of Rights, the [C]onfrontation [C]lause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy this right even when the hearsay is trustworthy." 402 F.3d at 790-91.[7]

Although cross-examination is now the constitutionally recognized tool for determining the reliability of testimony in criminal trials. *Crawford*, 541 U.S., at 67, the *Roberts* test was likewise a test for determining the reliability of testimony. *Id.*, at 61. The difference between the two methodologies is largely whether the judge determines reliability by application of a multi-factored test or whether the jury determines reliability through the process of adversarial testing. As the Court and other courts have already recognized, a shift from judge to jury as factfinder does not substantially increase the accuracy of the ultimate factual determination. *See Summerlin*, 542 U.S., at 356 ("When so many

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7. *See also Bintz*, 403 F.3d at 867 (observing that the rule of *Crawford* is "not a guarantee of accuracy, but an extension of the full constitutional protections of the Sixth Amendment."); *Mungo*, 393 F.3d at 336 (reasoning that while *Crawford* will improve a trial's accuracy by barring the admission of some unreliable evidence, it will, by the same token, "deprive[] [juries] of highly reliable evidence of guilt [that would have been admissible under the old rules], and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries.").

presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy."); *see also United States v. Sanders*, 247 F.3d 139, 149 (CA4 2001) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should not be applied retroactively because "a new rule mandating a jury to decide an issue rather than a judge cannot fall within the scope of the second *Teague* exception");[8] *Bilzerian v. United States*, 127 F.3d 237, 241 (CA2 1997) ("The rule in [*United States v.*] *Gaudin* [515 U.S. 506 (1995)] merely shifts the determination of materiality from the judge to the jury. This shifting does not 'alter our understanding of the bedrock procedural elements' essential to the fairness of a trial." (citation omitted)). For this additional reason, *Crawford* is not within the *Teague* exception for "watershed rules."

3. An issue that goes only to trial error – and is therefore subject to harmless-error analysis – cannot mark a watershed rule.

Finally, the fact that *Crawford* is subject to harmless-error analysis undermines the proposition that it could be a "watershed rule." A harm that can be cured by the introduction of evidence at another point in the same trial cannot be so fundamental that it changes the bedrock principles of criminal due process.[9]

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8. *See also Blakely v. Washington*, 542 U.S. 296, 323 (2004) (O'Connor, J., concurring) ("[W]e [held] in [*Summerlin*] that *Ring* (and *a fortiori Apprendi*) does not apply retroactively to cases on habeas review[.]").

9. *See Brown*, 381 F.3d, at 1226-27 (finding that *Crawford* cannot be a "watershed rule" because "Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial."); *see also Edwards*, 129 P.3d, at 988.

And *Crawford* is subject to harmless-error analysis. In *Delaware v. Van Arsdall*, the Court reiterated that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one" 475 U.S. 673, 681 (1986). Most errors in criminal proceedings – such as the erroneous admission of evidence – "occur during the presentation of the case to the jury" and "may be qualitatively assessed in the context of other evidence to determine" the effect on the trial. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Violations of the Confrontation Clause fall within this category. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (finding admission of non-testifying accomplice's confession, containing both statements against the accomplice's penal interest and statements inculpating the defendant subject to harm analysis); *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988) (noting that "denial of face to face to confrontation" in violation of the Confrontation Clause subject to harm analysis); *Lee v. Illinois*, 476 U.S. 530, 547 (1986) (admission of statement may still be "harmless when assessed in the context of the entire case against [the defendant].").[10]

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10. The State in *Crawford* did not challenge the lower court's holding that the violation in that case was *not* harmless, and the Court "express[ed] no opinion" on the matter. 541 U.S., at 42 n.1. Nevertheless, state courts applying *Crawford* on direct appeal have done so using a harm analysis. *See, e.g., People v. Cage*, 15 Cal.Rptr.3d 846, 857-58 (Cal. Ct. App. 2004) (partial publication); *People v. Pirwani*, 14 Cal.Rptr.3d 673, 688 (Cal. Ct. App. 2004); *People v. Vigil*, 127 P.3d 916, 929-30 (Colo. 2004), *petition for cert. filed*, May 12, 2006 (No. 05-11122); *Blanton v. State*, 880 So.2d 798, 802 (Fla. 2004); *People v. Shepherd*, 689 N.W.2d 721, 672 (Mich. 2004); *State v. Bell*, 603 S.E.2d 93, 116 (N.C. 2004); *State v. Johnson*, 98 P.3d 998, 1006-012 (N.M. 2004); *Wall v. State*, 184 S.W.3d 730, 745-47 (Tex. Crim. App. 2006); *Lee v. State*, 143 S.W.3d 565, 571 (Tex. App.—Dallas 2004, pet. ref'd). Also, after determining that *Crawford* should be given retroactive application, the Ninth Circuit employed a harm analysis. *See Bockting I*, 399 F.3d, at 1022.

A rule subject to harmless-error analysis necessarily does not implicate principles of fundamental fairness such that courts should apply it retroactively under *Teague*. Indeed, even errors that are considered structural and therefore require mandatory reversal without a harm analysis are not automatically applied retroactively. *See Tyler v. Cain*, 533 U.S. 656, 666-67 (2001) ("The standard for determining whether error is structural . . . is not coextensive with the second *Teague* exception, and a holding that a particular error is structural error does not logically dictate the conclusion that the second *Teague* exception has been met." (citations omitted)). The other five instances – apart from *Gideon* – in which the Court has recognized a structural error requiring automatic reversal have *not* been found to be watershed rules. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). If even a rule considered to be so fundamental that it requires mandatory reversal is not automatically a watershed rule, then a decision, such as *Crawford,* that is subject to harm analysis is all the less appropriate for retroactive application.

C. The Practical Impact of Applying *Crawford* Retroactively Should Inform the *Teague* Analysis.

The Court should not assess *Crawford*'s retroactivity under *Teague* in a vacuum. "'The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purpose for which the writ of habeas corpus is made available.'" *Teague*, 489 U.S., at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). Federal habeas review should not upset the finality of state convictions that were valid when entered on the basis of subsequent, gradual developments in

the law over which reasonable jurists may disagree. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Thus, the *Teague* analysis contemplates not only considerations regarding the substance of the rule, but also the effects on state criminal proceedings if the rule is retroactively applied.

Indeed, even before *Teague*, the Court recognized and respected these strong state interests when evaluating the retroactive implementation of criminal procedure rules:

> "The retroactive application of *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] would have a disruptive effect on the administration of justice. We can only guess at the number of cases where *Edwards* might make a difference in the admissibility of statements made to the police, but the number is surely significant. In all of those, some inquiry would be required to assess the substantiality of any *Edwards* claim. That investigation, and the possible retrial, would be hampered by problems of lost evidence, faulty memory, and missing witnesses." *Solem*, 465 U.S., at 650 (citing *Jenkins v. Delaware*, 395 U.S. 213, 220-220 (1969)).

These concerns apply equally in this case, and so the Court's determination should likewise account for the States' interest in the finality of their criminal convictions. *See Sawyer*, 497 U.S., at 242-43 ("The costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.") (quoting *Solem*, 465 U.S., at 654)). These interests strongly weigh against *Crawford*'s retroactive application.

1. Applying *Crawford* Retroactively Would Significantly Disrupt the States' Ability to Administer Justice.

Retroactive application of *Crawford* could imperil countless criminal convictions entered under the prior *Roberts* standard. As Chief Justice Rehnquist observed, "thousands of federal prosecutors and . . . tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists, is covered by the [*Crawford* majority's] new rule. They need them now, not months or years from now." 541 U.S., at 75 (Rehnquist, C.J., concurring in judgment) (citations omitted). And even that estimate presumed that *Crawford* would apply only prospectively. *Id.*

The sheer volume of judicial citations to *Crawford* attests to the magnitude of the potential fallout if its holding applies retroactively. *See* Robert William Best, *To Be Or Not To Be Testimonial?*, 2005 ARMY LAWYER 65, 87 (2005) (noting that "[e]very week, at least twenty opinions are released that make a citation to *Crawford*"). As of July 7, 2006, nearly 1,900 reported court decisions had cited *Crawford*. The citing courts represented all fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, the First through Eleventh Circuits, the District of Columbia Circuit, and federal district courts within all of those circuits.

The vast majority of these cases have raised the *Crawford* issue on direct appeal – only about 200 cases have addressed the issue on state or federal habeas review. But, if the Court holds that *Crawford* applies retroactively, the ratio between *Crawford* claims on direct review and those on habeas review could well be reversed. The resulting litigation would be staggering, straining the capacity of the state and federal courts.

2. Because the scope of the testimonial-evidence requirement remains unclear, criminal defendants would be all the more encouraged to seek habeas relief.

Crawford declined to provide "a comprehensive definition of 'testimonial,'" evidence. 541 U.S., at 75; *see also id.*, at 6 (Rehnquist, C.J., concurring in judgment) (arguing that *Crawford*'s test "casts a mantle of uncertainty over future criminal trials in both federal and state courts"). And *Davis* confirmed that whether evidence qualifies as testimonial will be a fact-specific inquiry. *See Davis*, 126 S. Ct., at 2270, 2273-74. Consequently, the federal courts will have to define *Crawford*'s scope experientially, developing its parameters over time on a case-by-case basis. In the interim, if *Crawford* applies retroactively, habeas counsel can be expected to make every effort to expand *Crawford*'s evolving definition of "testimonial evidence," thus further multiplying the number of habeas challenges to long-settled convictions.

The expected proliferation of habeas challenges springing from the still-evolving *Crawford* test not only would burden state prosecutors, but also would raise serious jurisprudential concerns. If federal courts decide *Crawford*'s scope principally in cases on collateral review, they will be developing the contours of a new test – one about which reasonable jurists by definition could disagree – based on records established in cases that were unquestionably constitutional when they became final. To do so would "seriously undermine[] the principle of finality which is essential to the operation of our criminal justice system." *Sawyer*, 497 U.S., at 242 (citing *Teague*, 489 U.S., at 309).

3. Any resulting retrials based on *Crawford* would be hampered by problems of lost evidence, faulty memory, and missing witnesses.

Finally, as in any case on collateral review, remand for a new trial on *Crawford* grounds would entail a new proceeding using old evidence, which may have deteriorated, become lost, or been destroyed. When a habeas petitioner obtains a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)) (internal citations omitted). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring).

These problems would only be exacerbated in a new trial predicated on the retroactive application of *Crawford*. Because a *Crawford* remand would be made specifically for the purpose of having a witness testify about a fact that was otherwise proved at trial, it would necessarily require fresh testimony of witnesses regarding incidents long-past. Any such trial would be subject to the fading of memory and the loss of key witnesses. Ironically, then, the results of these proceedings could be considerably less reliable than the original trials conducted under the *Roberts* standard. The States' substantial interest in avoiding widespread uncertainty weighs heavily against *Crawford*'s retroactivity.

II. The Court of Appeals Erred in Granting Habeas Relief Based on a Constitutional Right Not Clearly Established at the Time the State Court Adjudicated Bockting's Sixth Amendment Claim.

Even if the Court concludes that *Crawford* falls within *Teague*'s exception for "watershed rules," it should still reverse the court of appeals's judgment granting habeas relief. Congress has adopted a comprehensive statutory scheme governing federal habeas proceedings, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§2241-2266 (AEDPA). Bockting's petition is governed by §2254(d)(1) of the AEDPA, which by its terms does not incorporate the *Teague* exceptions. Rather, this provision conditions habeas relief on a showing that the petitioner's conviction was contrary to or an unreasonable application of "clearly established" precedent from this Court, and it is beyond dispute that the *Crawford* rule was not clearly established at the time the state court adjudicated Bockting's Sixth Amendment claim.

A. Section 2254(d)(1)'s "Clearly Established Federal Law" Restriction Does Not Incorporate the *Teague* Exceptions.

Under §2254(d)(1) of the AEDPA, habeas relief is conditioned on a showing that the state court merits adjudication was contrary to or an unreasonable application of "clearly established" Supreme Court precedent. The statute provides no exception to the "clearly established" requirement. The court of appeals, however, interpreted §2254(d)(1) as incorporating the *Teague* exceptions. Under the court's ruling, the phrase "clearly established" law includes new rules of constitutional law – rules not dictated by precedent – if these new rules fall within a *Teague* exception. As a result, some habeas petitioners will be able to circumvent §2254(d)(1)'s "clearly established" requirement. This interpretation of the statute is incorrect.

In determining whether the *Teague* exceptions are incorporated into §2254(d)(1), the "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (quotations omitted).

The Court has recognized that the inquiries under §2254(d)(1) and *Teague* are "distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). Some similarity exists because, with the exception of the source of controlling precedent, whatever would qualify as an "old rule" under *Teague* will constitute "clearly established" federal law under §2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 412 (2000). But otherwise, the "clearly established law" and *Teague* determinations are very different. For example, the two differ with respect to the timing at which the legal landscape is considered. Under §2254(d)(1), the federal court reviews only controlling precedents existing at the time the state court adjudicated the claim. *Teague*, on the other hand, focuses on precedents as of the date the defendant's conviction and sentence became final on direct review. "In this respect, the 'clearly established Federal law' phrase bears only a slight connection to [the Court's] *Teague* jurisprudence." *Williams*, 529 U.S., at 412. The two also differ in that §2254(d)(1) restricts the source of clearly established law to the Court's precedent. *Id.*

These differences extend to the *Teague* exceptions. A plain reading of §2254(d)(1) establishes that the *Teague* exceptions are not incorporated into that statute. Section 2254(d)(1) bars habeas relief when the federal law governing the prisoner's claim was not "clearly established" by the Court's precedent when the state court adjudicated the claim on the merits. Whereas the *Teague* doctrine

provides two exceptions to its bar against the application of new rules, the text of §2254(d)(1) does not: if the law was not "clearly established" – the rule was not dictated by precedent – §2254(d)(1) precludes habeas relief. And "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

A comparison of the text of §2254(d)(1) with the language of other AEDPA provisions confirms that Congress did not intend to include exceptions to the "clearly established" limitation. In other AEDPA provisions where Congress sought to incorporate *Teague* retroactivity principles (along with the *Teague* exception), it did so explicitly in the text of the statute. For example, §2244(b)(2)(A) states that a second petition is permitted where "the applicant shows that the claim relies on a *new rule* of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court . . . ." 28 U.S.C. §2244(b)(2)(A) (emphasis added); *see also* 28 U.S.C. §2255 ¶7,(1) (comparable provision for federal prisoners). Likewise, Section 2244(d)(1)(C) provides that, with respect to a right that "has been *newly recognized* by the Supreme Court and *made retroactively applicable* to cases on collateral review," the one-year limitations period for state prisoners begins to run on the date the Court initially recognized that right. 28 U.S.C. §2244(d)(1)(C) (emphasis added); *see also* 28 U.S.C. §2255 ¶6,(3) (comparable provision for federal prisoners). And, under §2254(e)(2)(A)(i), when the prisoner fails to develop the factual basis of his claim in state court, a federal evidentiary hearing is nevertheless permitted if, among other things, the claim relies on "a *new rule* of constitutional law, *made retroactive to cases* on collateral review by the Supreme Court. . . ." 28 U.S.C. §2254(e)(2)(A)(i) (emphasis added). Finally, under §2264(a)(2), a federal court may consider a claim not raised and decided on the

merits in state court if the failure to raise the claim properly was "the result of the Supreme Court's recognition of a *new Federal right* that is *made retroactively applicable*." 28 U.S.C. §2264(a)(2) (emphasis added). Each of these statutory provisions explicitly accommodates new rules that would apply retroactively under *Teague*.

By contrast, §2254(d)(1) does not permit consideration of a "new rule," regardless of whether the rule is judicially subject to retroactive application on collateral review. The statute limits the scope of controlling law to clearly established Supreme Court precedent – that is, precedent that would constitute an "old rule" under *Teague*. If Congress had intended for federal courts to consider new rules subject to retroactive application in making the §2254(d)(1) determination, it would have used phrases like "new rule of constitutional law" and "made retroactive to cases on collateral review," as it did elsewhere in the AEDPA. But it did not. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Walker*, 533 U.S., at 172 (comparison of Section 2244(d)(2) to other AEDPA provisions supplies "strong evidence" that, had Congress intended to allow tolling of the one-year limitations period during pendency of federal collateral review, it would have expressly mentioned federal review).

The Ninth Circuit offered three justifications for incorporating the *Teague* exceptions into §2254(d)(1). First, the court claimed that, in directing lower courts to undertake both inquiries in an AEDPA case, the Court "impliedly endorsed the application of *Teague* in the AEDPA context." Pet. App. C at 35a (citing *Horn*, 536 U.S., at 272). But in *Horn*, the Court stated that "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." 536 U.S., at 272; *see also Williams*, 529 U.S., at 412 (noting that in

one respect, "the 'clearly established Federal law' phrase bears only a slight connection to our *Teague* jurisprudence.")

Second, the Ninth Circuit asserted that the language of §2254(e)(2)(A)(i) showed "Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions." Pet. App. C at 35a. This conclusion does not follow. Section 2254(e)(2)(A)(i) has nothing to do with state habeas petitions; it concerns the appropriateness of federal evidentiary proceedings. The court may have presumed that, because Congress included *Teague* retroactivity principles in §2254(e)(2)(A)(i), Congress must have intended to incorporate them into §2254(d)(1). But the correct presumption is just the opposite. Section 2254(e)(2)(A)(i) provides for an evidentiary hearing where the claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Section 2254(d)(1), on the other hand, narrows the types of available claims to those premised on "clearly established" federal law, as determined by the Court. While the former explicitly embraces new rules and retroactivity principles, the latter does not.[11]

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11. Alternatively, the court of appeals may have deduced that, as one commentator has argued, if §2254(e)(2)(A)(i) "is to have any meaning, . . . then the *Teague* exceptions must still exist." Sharad Sushil Khandelwal, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 459 n.45 (1997). But this argument is also wrong. Section 2254(d)(1) does not apply when the state court did not decide the claim on the merits. And §2254(e)(2)(A)(i) authorizes federal evidentiary hearings regardless of whether the state court adjudicated the federal claim on the merits. Thus, even if §2254(d)(1) does not incorporate the *Teague* exceptions, there are clearly some circumstances when §2254(e)(2)(A)(i) would operate meaningfully – such as when the state court denied the claim on procedural grounds. But more importantly, under §2254(e)(2)(A)(i), an

Finally, the Ninth Circuit concluded that "the constitutional doubt canon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process." Pet. App. C at 35a. But this canon has two important prerequisites. First, the "statute must be genuinely susceptible to two constructions," a determination that is made "after, and not before, [the statute's] complexities are unraveled." *Almendarez-Torres v. United States*, 523 U.S. 244, 238 (1998). And second, the constitutional question must be one that leads the court to have grave doubt about the statute's constitutionality. *Id.*, at 239.

Section 2254(d)(1) is not genuinely susceptible to two constructions. As demonstrated, §2254(d)(1) provides that if the law was not "clearly established" – that is, the rule was not dictated by precedent – habeas relief is foreclosed. The statutory text contains no exception for new rules that apply retroactively. Additionally, other AEDPA provisions enacted at the same time as §2254(d)(1) demonstrate that when Congress intended to incorporate new rule and retroactivity principles, it knew how to do so.

Nor does the absence of retroactivity exceptions in §2254(d)(1) create grave doubt about the statute's constitutionality. As the Court recognized in *Felker v. Turpin*, 518 U.S. 651 (1996), "the power to award the writ by any of the courts of the United States, must be written by law" and "judgments about the proper scope of the writ are normally for Congress to make." *Id.*, at 664 (quotations omitted). Section 2254(d)(1) does nothing more than regulate the relief prisoners may obtain in federal habeas, and "Congress has

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evidentiary hearing is permitted only when the Court has held that the new rule of constitutional law applies retroactively to cases on collateral review. When this occurs, the same new rule that authorizes an evidentiary hearing under §2254(e)(2)(A)(i) will constitute clearly established precedent for purposes of §2254(d)(1).

ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is employed." *Lindh v. Murphy*, 96 F.3d 856, 872 (CA7 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (plurality opinion) ("[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . prescribe remedies. . . ."). [12] And the court's continuing ability to consider original writs for habeas corpus eliminates any constitutional doubt. *Felker*, 518 U.S., at 664.

B. *Crawford* Was Not "Clearly Established" Federal Precedent When the Nevada Supreme Court Adjudicated Bockting's Claim on the Merits.

The Nevada Supreme Court decided Bockting's Sixth Amendment claim on the merits in 1993. At that time, *Roberts* – not *Crawford* – was controlling Confrontation Clause precedent. Therefore, unless Bockting can show that the state court's merits adjudication was contrary to or an unreasonable application of *Roberts*, §2254(d)(1) forecloses his application for habeas relief.

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12. In numerous contexts the Court has recognized that habeas relief may not be available even when the underlying constitutional claim is meritorious. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984) (rejecting habeas claim based on good faith exception to Fourth Amendment exclusionary rule); *Nix v. Williams*, 467 U.S. 431 (1984) (same for independent discovery doctrine); *Stone v. Powell*, 428 U.S. 465 (1976) (holding that Fourth Amendment claims capable of full and fair litigation in state court are not generally cognizable in federal habeas review).

C. The Court Should Decide the Important Issue of Whether §2254(d)(1) Incorporates the *Teague* Exceptions.

The Court should resolve whether §2254(d)(1) of the AEDPA incorporates the *Teague* exceptions, for several reasons. *See* Pet. at i (Questions Presented III). First, resolution of this issue is needed to settle a conflict among the federal circuits and thereby ensure consistent application of §2254(d)(1). The Ninth Circuit explicitly read §2254(d)(1) "to incorporate the *Teague* exceptions. . . ." Pet. App. C at 35a. And the Third, Fifth, and Eighth Circuits have uncritically incorporated the *Teague* exceptions into their §2254(d)(1) determinations.[13] Conversely, the Fourth and Seventh Circuits have expressed the view that the *Teague* exceptions play no part in the §2254(d)(1) analysis.[14] The Second Circuit has recognized the existence of this debate, but has not yet resolved the issue.[15] Because the success of a habeas petition should not hinge on which circuit a State falls within, the Court should settle this dispute.

Second, §2254(d)(1) is an important federal statute affecting s multitude of cases. The AEDPA altered the landscape for state

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13. *See, e.g.*, *Lewis v. Johnson*, 359 F.3d 646, 653-54 (CA3 2004); *Cockerham v. Cain*, 283 F.3d 657, 660-61 (CA5 2002); *Williams v. Cain*, 229 F.3d 468, 474-75 (CA5 2000); *Evans*, 371 F.3d at 444-45.

14. *Ramdass v. Angelone*, 187 F.3d 396, 406 n.4 (CA4 1999) ("§2254(d)(1) can be seen as stricter [than *Teague*] in that it does not recognize *Teague*'s two traditional exceptions. . . ."), *aff'd*, 530 U.S. 156 (2000); *Gosier v. Welborn*, 175 F.3d 504, 510 (CA7 1999) (noting that §2254(d)(1) "closes the escape hatches in *Teague*. . . ."); *but cf. Bintz v. Bertrand*, 403 F.3d 859, 864-867 (CA7 2005) (considering *Teague* exceptions in §2254(d)(1) context).

15. *Mungo v. Duncan*, 393 F.3d 327, 334-35 (CA2 2004).

prisoners challenging their criminal convictions, and, at the center of that legislation lies §2254(d)(1), which provides the standard by which state court merits decisions are reviewed in federal habeas proceedings. As explained above, the court of appeals interpreted §2254(d)(1) in a manner inconsistent with the language of the statute and the purposes underlying the AEDPA's enactment. There is a pressing need for the Court's guidance on the correct application of this important statute. *Cf. Williams*, 529 U.S., at 362 (providing broad guidance on the proper interpretation of various aspects of §2254(d)(1)).

And finally, if the Court does not resolve this question, the court of appeals's holding that §2254(d)(1) incorporates the *Teague* exceptions may remain precedential authority, even if the decision is reversed on other grounds. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2. (CA9 1991). Thus, the Court's resolution of the issue is especially important to the nine States located in the Ninth Circuit.

For these reasons, the *amici* States urge the Court to reach the third question presented and hold that §2254(d)(1) of the AEDPA does not incorporate the *Teague* exceptions.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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